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# THE 411 ON 515: HOW OIRA'S EXPANDED INFORMATION ROLES IN 2002 WILL IMPACT RULEMAKING AND AGENCY PUBLICITY ACTIONS

JAMES T. O'REILLY\*

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## INTRODUCTION

There are many ways for an agency to achieve its purposes. The post-*Mead*<sup>1</sup> debates offer interesting insights about the federal agency desire to use alternate types of regulatory pronouncements to avoid “ossified” 553 rulemaking.<sup>2</sup> Yet, as we teach others how to navigate the regulatory proc-

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\* Visiting Professor of Law, *University of Cincinnati College of Law*.

1. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

2. 5 U.S.C. § 553 (2000).

ess, we should not look down one narrow channel when other streams are flowing to the same ocean. This Article seeks to stimulate more debate about the Office of Management and Budget's Office of Information and Regulatory Affairs (OMB-OIRA) and its role in overseeing agency information dissemination, which was previously uncontrolled by any external force and even today seems virtually unreviewable. The new section 515<sup>3</sup> offers some fascinating remedial choices for the opponent of an agency press release or a new rule, and the consequence of the new section 515 mechanisms will have a significant impact on the review of new regulations.

### I. NO RULE, NO REMEDY?

One can predict that fewer new rules will emerge from the current Bush administration, and that those rules which are issued will reflect the diminished impact that rulemaking projects have had in the years since ossification was first diagnosed by Professor Thomas McGarity a decade ago.<sup>4</sup> While so much attention is focused on judicial review of rules, we may have overlooked the unreviewable actions in which agencies are using the potent public relations weapon of risk disclosure more vigorously than ever. "Agency action"<sup>5</sup> generically can be read to include the affirmative issuance of press statements and Web site hit lists, both of which are forms of affirmative agency conduct, but these are rarely, if ever, remediable in the courts. What we may generically call the "disclosure method" of regulating is essentially one of graymail—give our agency staff what we want or we will go public with criticism, thereby smashing your stock price or embarrassing your chief executive. The disclosure weapon is more of a guerrilla type approach; there is no judicial review of a press release,<sup>6</sup> no remedy for a leak, no tort recovery for unkind words. So this device works a lot more cleanly and rapidly than rulemaking, with much more short-term

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3. See Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 515, 2001 U.S.C.C.A.N. (114 Stat. 2763) 29.

4. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); see also Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667 (1996); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking*, 94 NW. U. L. REV. 393 (2000).

5. 5 U.S.C. § 551(13) (defining "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . .").

6. See *Doe v. United States*, 83 F. Supp. 2d 833, 837 (S.D. Tex. 2000) (noting federal courts routinely dismiss cases brought for damages resulting from agency press releases).

impact upon the regulated entity or person. The peril to the regulated community is precisely the fact that agencies did not have a legally enforceable duty to assure "quality, objectivity, utility, and integrity"<sup>7</sup> of government agency "disseminated information" until the arrival of section 515 in 2001. We scholars of administrative law should examine how this new tool will complement the considerable power that already resides within OIRA.

More consideration of the agency disclosure mechanisms is warranted because disclosure has become a favored vehicle for achieving agency objectives in some agencies. A major role of agencies in the current administration will be to use the Internet "bully pulpit" of FirstGov.com<sup>8</sup> and other Web sites to impact upon private sector acts, statements, behaviors, or transactions that have a beneficial corollary effect for the agency's purposes. An example is a list of "approved," "environmentally friendly," or "safety partner" companies posted on the agency Web site. The attention getting role of the agency publicity machines has been successful. The correlation between government-generated bad news about a publicly traded corporation and stock market response has been evident, and the forceful assertion of agency condemnation may achieve more in a day than an adjudicative proceeding could produce in many months of effort.

## II. WHERE THE WOZZLE WASN'T

How should these non-permanent non-rules be described in our lexicon? Readers of the Winnie-the-Pooh books may recall the puzzlement felt by the curious bear when the Woozle, a mythical character he tracked, had disappeared. We might lump the actions agencies take against regulated entities into the classic "rule" or "adjudication" models, but there is a wider ambiguous category of actions that is the indefinable, escape-prone "Woozle" of administrative law. Bearing in mind the shortcomings of the Administrative Procedure Act (APA), we search in vain for a remedy against the damage that these non-rules can cause, when these actions are misfired by an overeager or premature drum-beating by an agency staff.

I confess, I have deviated from the assigned topic—OMB review of regulations—in search of this Woozle. Opponents of agencies now have the potent weapon of section 515 with which to detect and to impact upon federal agency Woozling. I admit that it is tough to build a publishable conceptual construct around the Woozle that agency publicity and informal

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7. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 515(a), 2001 U.S.C.C.A.N. (114 Stat. 2763) 29, 30.

8. The Web site <http://www.firstgov.gov> is the central executive branch site as of 2001.

attacks have become. We do not teach much about this phenomenon in our Administrative Law classes because, as Professor Ernest Gellhorn correctly wrote in a wonderful 1973 Harvard Law Review article,<sup>9</sup> there are no real remedies in our arsenal of judicial review tools that can be used against agency publicity. He cited among other cases, the first nationwide televised press conference of a Department of Health, Education, and Welfare Secretary, warning erroneously about cranberries just before Thanksgiving 1959;<sup>10</sup> the mistake cost growers and taxpayers, who paid compensation, millions of dollars. Today, we have Drudge Report leaks, e-mail listservs, special interest chats, and all the other e-methods with which agencies can execute their missions.

Also, today the aggressive regulator, who is impatient with rulemaking, can opt to use the Web site, the internet chat, the cable television exclusive leak, or the press conference; so the vehicles for impacting regulated entities have quadrupled or multiplied many times over, without a corresponding right or remedy for those who disagree with the agency. There is minimal hope offered to dismayed victims under the Federal Tort Claims Act (FTCA)<sup>11</sup> or a string of unreceptive Court of Federal Claims cases.<sup>12</sup> Relatively few agencies have established internal rules on the aggressive use of adverse publicity.<sup>13</sup> The body of precedential case law that is the raw material for our lectures does not include sufficient court decisions on the quality of agency data and the resulting disclosures, so teachers avoid this topic.<sup>14</sup> We can tell our students that information dissemination is a

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9. See Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1420 (1973) (stating "judicial review cannot undo the widespread effects of erroneous adverse agency publicity.").

10. The Secretary's nationally televised press conference was broadcast a few weeks before the nation's shoppers reached for their annual can of cranberries. The Secretary announced pesticide residues were present and then said he was not going to eat cranberries, so the nation stopped eating them. Ultimately, it was determined that his facts were wrong, and Congress paid millions in compensation for the error. See *id.*; see also William W. Goodrich, *Cranberries, Chickens and Charcoal*, 15 FOOD DRUG COS. L.J. 87 (1960).

11. See 28 U.S.C. § 2680(h) (1994) (excluding intentional torts such as slander or libel from the class of compensable actions).

12. See, e.g., *Banfi Prods. Corp. v. United States*, 41 Fed. Cl. 581 (1998).

13. See Dep't of Health and Human Serv. Release of Adverse Information to News Media, 45 C.F.R. § 17 (1997) (defining adverse information and addressing basic dissemination policies); Administrative Practices and Procedures, 42 Fed. Reg. 12,436 (Mar. 4, 1977) (proposing new publicity policy for the Food and Drug Administration (FDA)); Release of Adverse Information to News Media, 41 Fed. Reg. 2 (Jan. 2, 1976) (providing notice of Department of Health, Education, and Welfare rulemaking regarding release of "adverse information").

14. Among the few was the Chilean grapes case, *Fisher Bros. Sales v. United States*, 46 F.3d 279, 288 (3d Cir. 1995), in which errors in compiling data of questionable validity

species of discretionary executive power, but informational tools do not seem to receive the scholarly scrutiny that they should. Beginning in fall 2002, the new section 515 mechanisms will inhibit some of the agencies that engage in rulemaking by encouraging the public to complain about or question their factual and statistical support for new rules. This Article addresses section 515's reach, and then postulates some ways in which it will impact rulemaking.

### III. THE ROLE OF OMB

#### A. *How OIRA Became the Data Quality Police*

Legislative changes to the standards of administrative agency data quality were adopted in 2000 under the sponsorship of U.S. Representative Jo Ann Emerson, a Republican from Missouri.<sup>15</sup> A House Appropriations Committee rider, section 515 of H.R. 5658, was added at the very end of the legislative process, wrapped in the omnibus budget bill, which became Public Law 106-554 on December 21, 2000. The legislation requires the OMB to adopt government-wide guidelines for maximizing "quality, objectivity, utility and integrity" of government agency disseminated information, including statistical data.<sup>16</sup> The statute delegates a set of specific duties and oversight powers to the OMB.

The text of the new statute reads as follows:

SEC. 515. (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.

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from a FDA laboratory were deemed insufficient to justify recovery for millions of dollars of losses in the Chilean fruit export market.

15. See Jeffrey Brainard, *New Federal Science-Quality Standards Worry Researchers*, 48 CHRON. OF HIGHER EDUC., Oct. 12, 2001, at A31. Representative Emerson, former Senior Vice President of the American Insurance Association, was a freshman member of the House Appropriations Committee when the rider was added to H.R. 5658 in the 106th Congress. For more background information on Representative Emerson, see U.S. Representative Jo Ann Emerson, at <http://www.house.gov/emerson> (last visited Mar. 27, 2002).

16. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 515, 2001 U.S.C.A.N (114 Stat. 2763) 29, 30.

(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.<sup>17</sup>

The references to the Paperwork Reduction Act (PRA) relate to section 3504, on OMB coordinating authority,<sup>18</sup> and section 3516, which confirmed OMB's legal authority to issue rules.<sup>19</sup> Whoever crafted section 515 deftly tied OMB's existing authority with a duty to coordinate agency behaviors, leaving little room for agencies to resist the coordinated control mechanism or to argue for its inapplicability.<sup>20</sup>

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17. *Id.*

18. *See* 44 U.S.C. § 3504(d) (1994 & Supp. V 1999) (“With respect to information dissemination, the Director shall develop and oversee the implementation of policies, principles, standards, and guidelines to—(1) apply to Federal agency dissemination of public information, regardless of the form or format in which such information is disseminated . . .”).

19. *See id.* § 3516 (1994 & Supp. V 1999) (providing rulemaking authority to the director of OMB).

20. Discussion at the American Bar Association Fall Administrative Law Conference dinner in Washington on October 31, 2001, honoring past directors of the OIRA, suggested that Jim Tozzi, former OIRA director, had been the principal drafter of the 515 language (notes on file with author).

### B. OMB's Response

The message of section 515 is clear to OMB: "agencies should not disseminate information that does not meet some basic level of quality."<sup>21</sup> A person who disagrees with the agency's data has a new right to "seek and obtain correction of information maintained and disseminated by the agency . . . ."<sup>22</sup> This right arises no later than October 1, 2002.<sup>23</sup> Though judicial review of the new "administrative mechanisms" is not expressly provided, it is very likely to be inferred, once the challenger has exhausted the new administrative remedies in agency rules adopted under section 515(b)(2)(B).

OMB met the statutory deadline for government-wide guidelines. The September 28, 2001, OIRA controls on agency disclosures<sup>24</sup> were issued as information quality guidelines that create an obligation upon federal agencies to be accountable for their published and Web site statements. Under the new requirements, executive branch agencies will be required to adopt their own internal rules (with OMB oversight) to invite requests to correct any challenged information that does not comply with the quality guidelines. OIRA told the agencies: "This law affects the regulatory development process because Federal regulations may be based on the findings of scientific or other research studies disseminated by a Federal agency in the course of the rulemaking."<sup>25</sup> So, the challenger can complain about the agency's facts, using a channel that is separate and apart from the challenger's dissenting comments filed about the proposed rule. The agency has its traditional APA duty to respond to significant comments,<sup>26</sup> and now must have within its regulations a specific mechanism for the correction of

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21. Proposed Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 34,489, 34,490 (June 28, 2001).

22. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 515(b)(2)(B), 2001 U.S.C.C.A.N. (114 Stat. 2763) 29, 30.

23. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 49,718, 49,724 (Sept. 28, 2001) (stating pre-dissemination review begins October 1, 2002).

24. See *id.*

25. OMB Regulatory Review: Principles and Procedures Attachment to Memorandum from John D. Graham, Administrator, Office of Information & Regulatory Affairs, to the President's Management Council (Sept. 20, 2001), available at [http://www.whitehouse.gov/omb/inforeg/oira\\_review-process.html](http://www.whitehouse.gov/omb/inforeg/oira_review-process.html).

26. See 5 U.S.C. § 553(c) (2000) (requiring agencies to hear and consider public comments on rulemaking). It would be arbitrary for an agency to ignore significant comments on the proposed rule, see *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983).

data that is challenged by any person.<sup>27</sup> A prudent opponent of rulemaking will challenge the data accuracy first, before the Notice of Proposed Rulemaking appears, so that the agency must be prepared to defend itself twice in the data-dependent rulemaking situations.

### C. OMB Retreats

In January 2002, OMB went further to cushion the effects of section 515 on agencies, responding to the agency desire to weaken demands for “accuracy” of technical data.<sup>28</sup> OMB directly admitted that Internet dissemination of agency data “increases the potential harm that can result from the dissemination of information that does not meet basic information quality guidelines.”<sup>29</sup> The OMB excused agencies from the requirements, except the “essence of the guidelines,” where the states, contractors, private submitters, etc. had supplied the data.<sup>30</sup> This “essence” escape clause is a major loophole in the corrective action that section 515’s sponsors had apparently intended, although the future challengers of agencies are likely to disdain an agency claim that Web site dissemination met the mere “essence” of section 515.

Further exceptions to section 515 in the January 2002 announcement included press releases, public filings, and charges made by agencies in their adjudicative processes. The situation of the agency press conference announcing that Doe’s Widget Factory is being charged with polluting the local river is excluded from section 515 by this OMB guidance.<sup>31</sup> The January 2002 revisions also watered down what would be considered “influential,” a special category under section 515, so fewer agency actions would be covered by this higher test.

The reproducibility standard—whether an agency report about data is believable because its data can be reproduced—received extensive attention in the 2002 revisions. OMB related how it planned to integrate the data quality provisions with 1996 legislation dealing with adverse health effects.<sup>32</sup> These elements of risk assessment and risk communication have been incorporated by OMB into the section 515 process with the intriguing

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27. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. at 49,720 (requiring agencies to establish administrative mechanisms).

28. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369 (Jan. 3, 2002).

29. *Id.* at 370.

30. *Id.*

31. See *id.* at 371.

32. See *id.* at 375 (citing 42 U.S.C. § 300g-1(b)(3)(B)).

limitation that an agency could either “adopt or adapt” those norms—allowing agencies to do less where they opt to “adapt” these risk norms.<sup>33</sup>

#### IV. BACKGROUND

##### A. *How Data Became Reviewable*

In section 515, the 106th Congress (or whatever handful of members happened to have read that far in the voluminous omnibus budget bill) told OMB to tighten up the federal agency norms for the dissemination of information by agencies. This information coordination task is one of the ancillary aspects of the Office of Information and Regulatory Affairs (OIRA) role in the operation of the Paperwork Reduction Act.<sup>34</sup> That Act has been disappointing, and I have been critical of the PRA's relationship with OIRA in past articles on this subject.<sup>35</sup> The performance of OIRA under the PRA has been less than stellar. Data reviews and advocacy for quality are tasks for OIRA in its newly added function as the overseer of section 515.<sup>36</sup> Ironically, though section 515 came from the Appropriations Committee riding an appropriations bill, there did not seem to be extra money enclosed with the package of responsibilities handed to OIRA.

Appropriations riders arrive shrouded in mystery, with none of the lobbyist-drafter's fingerprints, for implementation. They challenge the tools of interpretation by scholars since they offer a textualist's ideal form, with none of that messy legislative history to deal with. Some of the questions were dealt with in the Guidelines' response to comments<sup>37</sup> and some ambiguities are likely to be addressed in the D.C. Circuit in the future.

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33. *Id.* at 375.

34. See 44 U.S.C. § 3501(7) (Supp. IV 1999) (describing purposes of the Paperwork Reduction Act).

35. See James T. O'Reilly & Phyllis E. Brown, *In Search of Excellence: A Prescription for the Future of OMB Oversight of Rules*, 39 ADMIN. L. REV. 421, 438-39 (1987) (critiquing Paperwork Reduction Act); see also James T. O'Reilly, *Who's on First: The Role of the Office of Management and Budget in Federal Information Policy*, 10 J. LEGIS. 95, 111-15 (1983) (discussing objections to the PRA prior to its passage).

36. See Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 512(b)(2)(C)(ii), 2001 U.S.C.A.N. (114 Stat. 2763) 29, 30 (granting complaint oversight role). This is not clearly an appeal but it suggests a follow-up would be expected by OIRA for agencies with excessive rates of complaints.

37. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 49,718, 49,720-21 (Sept. 28, 2001) (providing OMB's responses to concerns regarding administrative mechanisms).

### B. Daughter of Shelby

OMB's proposal suggests, between the lines, that OIRA staff was reluctant to take on the tasks assigned.<sup>38</sup> They had been badly mauled by the largest universities and advocacy organizations in the 1999 debate over Senator Richard Shelby's statutory command for the disclosure of research data underlying federal agency decisions.<sup>39</sup> Now academic researchers feared a second wave of control efforts.<sup>40</sup> This new section 515 issue was called "daughter of Shelby" because of the comparable controversy over OMB's consideration of rules that would have given access to the underlying raw scientific data that underlay agency rulemaking decisions.

Seen from the outside, OMB was not eager to uphold the new data dissemination quality role in 2001, as it had likewise been reluctant to fight over the underlying data disclosure role in 1999. The hot summer debate in 1999 could have required disclosure of supporting data by federal contractors, including scientists, as Senator Shelby intended. But the proposal drew 9,000 comments, many identical emails from related sets of researchers, and the apparent intervention of White House political staff led OIRA managers to adopt much weaker rules, narrowing the Shelby Amendment's coverage significantly from the intended disclosure rights of that legislation.<sup>41</sup> OIRA staff had experienced the uncomfortable posture of drawing 9,000 hostile comments and displeasing all of the constituencies, so the 2001 guidelines on section 515 may have been seen as more of the same pain. During the 1999 Shelby Amendment rulemaking,<sup>42</sup> the dispute was about forcing nongovernmental data to be disclosed at all; in 2001 the question was about remedies when the agency actually did use the supporting data, from whatever source. Again, as with their mobilization for the 1999 OIRA Shelby project, the university and advocacy group lobby

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38. See, e.g., Proposed Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 34,489, 34,489-90 (June 28, 2001) (providing background for section 515 and demonstrating congressional and executive encouragement of agency use of modern dissemination methods).

39. A rider attached to the OMB appropriations bills was adopted in Pub. L. No. 105-277, 1998 U.S.C.A.N. (112 Stat. 2681) 495 (requiring OMB amend "Circular A-110 to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act.").

40. See Brainard, *supra* note 15, at A31 (stating researchers fear agencies might not publish peer-reviewed studies because of increased costs).

41. See OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 64 Fed. Reg. 54,926 (Oct. 8, 1999) (discussing amendment's impact).

42. See *id.* (mentioning history of OMB appropriation for FY 1999).

swung into action and their few dozen comments used many virtually identical phrases<sup>43</sup> in which they condemned OMB for allowing complaints about "accuracy or objectivity" of data that their members may have provided to agencies.<sup>44</sup> But, the Bush administration apparently did not balk on the section 515 issues as the Clinton staff had done on the Shelby disclosure debate. The section 515 legislative command is more specific than was the Shelby Amendment, empowering people to complain about the inaccuracy of the information that is disseminated, or its lack of "objectivity," and then requiring the agency both to respond to the critique and to regularly inform OMB about the numbers of data quality complaints and how they were handled. Again, whoever crafted this legislative rider in 2000 had learned well from the 1999 experience of the Shelby battle.

## V. HOW SECTION 515 AFFECTS STRUCTURES

### A. Structure and Appellate Ramifications

The intragovernmental structural significance of this issue is that OIRA, the delegee of these new powers, is acting as the agent of Congress in imposing the new rules upon many separate agencies.<sup>45</sup> These agencies will bear the cost and the burdens of correcting, or refusing to correct, data that is challenged. OIRA appears to be soothing the agencies' feelings and cautioning opponents of section 515 not to kill the messenger. It will be the rulemaking counsel of agencies' legal offices and their rule-defending appellate counsel who will be most surprised by the new tool available to challengers. The D.C. Circuit's rejection of an agency decision to proceed with a rule whose supporting data is of questionable "accuracy and objectivity" would send shock waves through the bureaucracy.

The agency staff, who had used dissemination of information as a painless, remedy-less vehicle, might now be held back by the pressures for accuracy. We may see the safety agencies, in particular, struggle under section 515, as their regulated adversaries demand "correction" of volumes of data as to which the regulated firms' scientists have far more expertise than the agencies can afford to hire or rent from consultants. If five hundred experts employed in the furniture industry are lined up to dispute the accuracy

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43. See OMB COMPILATION, PUBLIC COMMENTS: OMB'S PROPOSED DATA QUALITY GUIDANCE (2001) (on file with author).

44. See Brainard, *supra* note 15, at A31 (using the phrase "Daughter of Shelby" in reference to the new section 515).

45. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 49,718, 49,723-24 (Sept. 28, 2001) (stating pre-dissemination review begins October 1, 2002).

and “objectivity” of Consumer Product Safety Commission (CPSC) data dissemination based on two consultants’ views of furniture safety, the CPSC’s appellate success in defending a rule may decline even more than its pre-515 experience.<sup>46</sup>

### *B. Interactions with OMB Rule Reviews*

How will the information dissemination roles of 515 fit with the rule-making analysis roles under Executive Orders,<sup>47</sup> that are the more familiar task of OIRA? The 515 norms relate to quality of data being relied upon; the data sets are already disclosed at some point during the rulemaking, but section 515 insists that the agencies check the data for quality and (much more importantly) allow complaints to be made for correction of the data. The analysis roles deal with quality of the decisional factors and how the factors are balanced. An agency that shows that it cares more attentively about its data quality will presumably do a better job with the entire rule-making process.

The quality of technical support data has an impact on credibility and challenges to quality have an impact on the public’s acceptance of the agency rules. The statistics on which the agency relies to support an economic regulatory control would be subject to challenge by a person who complains that the data is inaccurate. In anticipation of future environmental rulemaking or pronouncements of policy, the Environmental Protection Agency can expect trade groups representing industrial firms to file hundreds of section 515 complaints beginning in late 2002, when its correction rules must become effective.

The impact of section 515 will be to allow businesses, organizations, nonprofits, states, and other groups to check the statistics the agency is using and to compel the agency to explain the errors in that data before the rulemaking is completed.<sup>48</sup> Beyond statistics, which are part, but not all, of

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46. See, e.g., *Gulf S. Insulation v. CPSC*, 701 F.2d 1137, 1149-50 (5th Cir. 1983) (holding Consumer Product Safety Commission (CPSC) must regulate urea-formaldehyde foam insulation pursuant to Federal Hazardous Substance Act); *CPSC v. Anaconda Co.*, 593 F.2d 1314, 1322 (D.C. Cir. 1979) (remanding for determination of whether CPSC had jurisdiction to regulate aluminum branch circuit wiring systems as distinct commerce articles); *D. D. Bean & Sons Co. v. CPSC*, 574 F.2d 643, 653 (1st Cir. 1978) (holding CPSC established insufficient evidence justifying proposed fragmentation performance requirement); *Aqua Slide ‘n’ Dive Corp. v. CPSC*, 569 F.2d 831, 844 (5th Cir. 1978) (concluding CPSC inadequately provided evidence supporting warning sign and ladder chain requirements for water slides).

47. See, e.g., Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735-36 (Oct. 4, 1993) (articulating principles for agency regulation promulgation).

48. Beyond statistics, there could be corrections of historical data, listings, etc. because section 515 is expressly not limited to statistical data.

the covered information, section 515 will allow complaints about a lack of "objectivity," which may mean the selection of decisional criteria other than the criteria that an "objective" peer norm would have selected. But, section 515 has several potential applications. The complaint may arrive before, during, or after an agency uses that data in press releases, rules, adjudication of penalties, or other agency actions. It is foreseeable that the defense sequence for lawyers defending post-2002 civil penalty cases will routinely involve discovery, Freedom of Information Act requests,<sup>49</sup> section 515 complaints, and a request for stay pending outcome of the agency's response to the section 515 critique.

Of course, the quality of regulatory agency information varies. Historically the detail and peer review quality of agency supporting data has varied from the sublime to the ridiculous; in the latter category we have the swimming pool slide rule, invalidated because the data on signage was so amateurishly developed in the backyard of the CPSC's "expert,"<sup>50</sup> and the hypoallergenic cosmetics case, where the rule was totally vacated for having depended upon an invalidated consumer market study, which the sponsor of the study had discarded.<sup>51</sup> Neither agency has returned to re-visit those rulemaking losses with better factual support.

### C. Parallels

There are parallels here to the rights that exist, but they are rarely exercised in the Privacy Act.<sup>52</sup> The 1974 privacy legislation empowers a person to request the agency correct an inaccurate or unfair statement about that person; agencies can do so by deleting the bad information or by posting the person's own statement of objections within the same files, to be disclosed in the future when the personal data is revealed.<sup>53</sup>

Another statutory analogue will be section 6 of the Consumer Product Safety Act (CPSA), which was amended in 1982 to require that the CPSC must assure that its disclosures of information about products are accurate and balanced.<sup>54</sup> While this has not inhibited the CPSC from bold use of news media on categorical safety issues about generic products, the Com-

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49. See 5 U.S.C. § 552 (2000) (stating the procedure for making documents available to the public).

50. See *Aqua Slide 'n' Dive Corp.*, 569 F.2d at 840 (noting inadequacy of risk assessment data).

51. See *Almay, Inc. v. Califano*, 569 F.2d 674, 682 (D.C. Cir. 1978) (discussing rule invalidation based on flawed Federal Trade Commission survey).

52. 5 U.S.C. § 552a (2000).

53. See *id.* § 552a(e)(5) (explaining agencies shall "maintain all records . . . with such accuracy, relevance, timeliness, and completeness as is reasonably necessary . . .").

54. See 15 U.S.C. § 2055(b) (2000) (establishing disclosure guidelines).

mission has been cautious about naming individual products without careful internal review of the technical support documentation. It may be that section 515 is the closest to a government-wide version of CPSA section 6 that we will ever see. If so, the effect will not be dramatic, but the awareness of the new constraint will subtly affect the dissemination of data-based pronouncements by agency managers.

## VI. BENEFITS TO AGENCY CREDIBILITY

### A. *Benefits to Agency Credibility*

Parallel to the improvement of the rulemaking “record” is the improvement of what the agencies send out as their conclusions based on data, often in Web postings or press releases. The new slant after section 515 is that there will be a more correct and appropriate content. Perhaps an enhanced reputation for peer review of statistics, for reproducibility of scientific studies, and for meticulous fact checking would give a conscientious agency the benefit of making the agency message more believable.

The quality control effort may bring unexpected benefits of dissuading some commentators from litigating against a tightly supported regulation. The corrections and rebalancing that the agency may do as a result of the section 515 complaint may make it less necessary for the affected group to invest in litigation.

### B. *Accuracy as an Added Task for OIRA*

While making these strides toward accuracy of disseminated information, OIRA staff will simultaneously be doing their existing set of review tasks. OIRA staff does not have the luxury of resting on their laurels awaiting a late 2002 review of agency regulations.

OIRA still must implement the new provisions of the Government Paperwork Elimination Act<sup>55</sup> and be prepared for a new executive order of regulatory analysis, if such an order is issued. In the OMB’s congressional testimony, there is a current of anxiety about the piling on of analysis and review requirements.<sup>56</sup> OIRA is tasked with many coordinating, commenting, and accountability roles for which it has not received substantial

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55. Omnibus Consolidated Appropriations Act, Pub. L. No. 105-277, 1998 U.S.C.C.A.N. (112 Stat. 2681) 495.

56. See *How Best to Implement the Government Paperwork Elimination Act (GPEA): Before the House Comm. On Gov’t Reform*, 106th Cong. (2000) (statement of Mitchell R. Daniels, Director, Office of Management & Budget), available at <http://www.whitehouse.gov/omb/legislative/testimony/20010627.html> (last visited Apr. 17, 2002).

fiscal increases. The accuracy determination is made by the agency; the dispute about inaccurate or non-objective agency statements or publications rises from the agency to the court, not from the agency to OIRA by some form of administrative appeals channel. OIRA may critique the annual reports that it is required to receive—but it does not appear to sit as the review board for complaints against individual decisions made by individual agencies.

### C. Collateral Attacks

Federal Torts Claims Act exclusions for slander, libel, and other misleading statements about private persons, the classic intentional torts,<sup>57</sup> have been construed to prevent most direct damages lawsuits against federal agency press releases and pronouncements.<sup>58</sup> In a few cases, Congress has passed private relief bills sending the claim to the Court of Federal Claims, where a small number of claims have been granted on an ad hoc basis.<sup>59</sup>

But, section 515 mechanisms may establish a collateral non-cash remedy—agency retraction of the inaccurate or misleading statement. The reputational injury is not eliminated, but may be mitigated. For example, the inaccurate statement about widgets found in an agency's *Federal Register* notice may be retracted when the new section 515 mechanism is exercised by the Widgets Association. The Widgets Association will petition for the retraction to be posted in the next available issue of the *Federal Register*, since it is generally known that affirmatively harmful statements make news, while retractions are rarely noticed by the public.<sup>60</sup>

## VII. LOOKING AHEAD: FINAL QUESTIONS

Will OIRA do much jawboning of agencies with the new authority? I think not. The experience with the Shelby amendment in 1999 suggests that OIRA leadership will do as little as possible to motivate reluctant

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57. See 28 U.S.C. § 2680(h) (1994) (enumerating applicable torts under FTCA).

58. See, e.g., *Fisher Bros. Sales v. United States*, 46 F.3d 279, 288 (3d Cir. 1995) (holding negligence cannot give rise to FTCA liability); see also *Banfi Prods. Corp. v. United States*, 41 Fed. Cl. 581, 583-84 (1998) (reasoning Congress provide basis for considering and reporting any gratuity award pursuant to 28 U.S.C. §§ 1492 & 2509); *Lance Indus., Inc. v. United States*, 3 Cl. Ct. 762, 777-78 (1983) (stating misrepresentation claim against government exceeds purview of FTCA).

59. See *Marlin Toy Prods., Inc. v. United States*, 218 Ct. Cl. 630 (1978) (referring claim based on damages suffered due to an erroneous listing by CPSC).

60. The U.S. Supreme Court has noted this phenomenon for centuries, beginning with *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319 (1788) (positing retractions rarely carry same public notice as do false charges).

agency heads to impose quality standards. The existing resources do not allow OIRA to act as an appellate body for inaccuracy disputes under section 515. Passive sub-delegation is the most likely approach to OIRA's implementation. So long as Representative Emerson, the principal sponsor, is not paying close attention, this may be a sufficient tactic; but administrators do not ignore the appropriators, for the House Appropriations Committee pencils have very powerful erasers.

Can data quality enhancement make a difference in agency rulemaking? Perhaps. OIRA has an information role under the Paperwork Reduction Act and now section 515, as well as its regulation oversight role. An agency with an impressive record on accuracy is far more likely to win easy clearance of the analysis documentation that supports a final regulation. Poor data quality practices will inevitably draw criticism. OIRA may become a referee or midlevel supervisor of the quality of supporting data, with the courts as the ultimate arbiters.

Could a section 515 dispute affect the general deference of courts toward the factual aspects of agency rulemaking? Possibly. The preamble to the final rule may be more vulnerable if it remains silent about a pending and unresolved challenge made under section 515 to the accuracy of the underlying data, for this silence may be read as arbitrariness.<sup>61</sup> To the extent the enabling statute imposes "substantial evidence" review,<sup>62</sup> the section 515 challenge undercuts the agency claim that the record taken as a whole contains sufficient support.

Should section 515 have been done at all? Yes. Quality in data is a credibility-enhancing factor in any enterprise, especially one doing the people's business. The regret may be that courts will be stuck with textualist tools only, for the application of section 515 in specific complaint cases, in the absence of any historical justifications or amplifications of the inquiries that section 515 requires. There are many ways for an agency to achieve its purposes, and in each one the accuracy of the supporting data is imperative. One can surely argue the small amount of notice this legislative change received was a ploy by anti-agency forces, but their timing worked, as other riders in other statutes have worked in more narrowly targeted situations. Now it may be the agencies' turn to plead with Congress for exclusions and exceptions from the section 515 strictures, but there may be few elected officials, veterans of electoral mud-slinging, who show sympathies for an agency plea to "please let us disseminate more inaccurate statements."

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61. The agency will, of course, respond quickly so that it avoids the arbitrariness norm of "entirely failed to consider an important aspect of the problem . . ." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added).

62. 5 U.S.C. § 706(2)(E) (2000).

## CONCLUSION

Prudent agencies will be attentive to the aspects of "regulation by information" as a result of new section 515. Some agencies will elaborately review and revise their information dissemination stages, and that will be a laudable and positive result of section 515. Others will respond to challenges as they arise, by asserting the utility of a proposed rule's supporting data will be assessed through public comments on that rulemaking proceeding. Others will stonewall the challenger, await lawsuits, and hope the courts dislike these actions as collateral attacks upon agency substantive decision making. While there is no express cause of action for failure to respond adequately to a challenge, courts are very likely to infer the existence of a right of judicial review.

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