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Docket OEI-10014
Room B607 Northeast Mall
U.S. Environmental Protection Agency
401 M St. SW
Washington DC 20460

Dear Colleagues:

The Section of Administrative Law and Regulatory Practice of the American Bar Association is pleased to submit comments on the proposed guidance for data quality that your agency has proposed under Section 515 of Public Law 106-554. The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

These comments are focused on the mechanisms proposed for implementation of section 515's "correction of information that does not comply with (OMB guidance)". In commenting on the mechanisms we hope to improve them; these comments do not suggest that any of the substantive objectives of the agency discussed in your published proposal would or would not have our Section's support. Because many of the nation's experts in the administrative process and information policy are members of our Section, we hope to speak to the process and procedural aspects of the proposed guidelines.

1. EPA expressly rejects having a correction request mechanism while a rulemaking file remains open (p. 23 line 743). This may be too harsh. 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 line 743 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 line 737 "freeze" period be much narrower: "It pertains to EPA actions, during the 60 day comment period (or extensions thereof) where the comment is most appropriately presented as part of the rulemaking record for consideration by the rulemaking decisional officials."

2. It seems unprecedented to conflate a "late" comment with a "frivolous" comment in p. 23 line 750. The existence of the section 515 process as a new statutory obligation

should be conceded; the data quality correction mechanism did not arise from section 553 of the Administrative Procedure Act. By merging the two and dismissing as "frivolous" (regardless of content of the comment) a late-arriving request, EPA may be inviting judicial review and reversal. It would be optimal to encourage rulemaking-related correction requests to occur inside the 60-day comment period (or extensions) as part of comments on the rule. But a later request should not be barred by the close of the comment process. If its content is really frivolous (rather than being chronologically detached from the comment period) then dismissal is appropriate.

3. The statement that EPA "may elect not to correct...due to Agency priorities, time constraints or resources" (p. 23 at 762) seems to defy the section 515 mandate. Why would a prudent federal agency not correct a false statement on its website? If the words "seek and obtain correction" in the statute mean that the affected person can obtain correction, how can the agency say that it cannot be obtained, once the data is shown to be wrong or misleading? We would recommend greater respect for the statute with words such as "may elect to postpone the correction", together with a temporary marker on the agency website that flags the data in red, informing the web visitor in the interim that the data is acknowledged to be wrong and that it will be corrected in a short time. This is particularly appropriate where a large data base is so expensive to refresh with new data that a scheduled updating of the data occurs on a monthly or quarterly basis; the temporary flag warns that the data cannot be relied upon and will be removed soon.

4. We commend the innovative approach to appeals at p. 24 line 781. Because the challenge seeking correction may involve substantive policy issues, it seems to us appropriate that this collective effort involve senior policy officials of the agency. We endorse the useful and efficient structure of a central handling of incoming requests (p. 27) and we encourage the appeals be handled within 90 days (p. 27).

5. Use of models as a basis for decisions carries with it the risk that the model's assumptions are flawed. This is a class of issues that seem quite appropriate for data quality activities. The statement at p. 17 lines 541-544 that determinations of "remedies to address such liability" are categorically excluded poses a concern as perhaps overly broad. Models should be able to be evaluated and corrected. Lines 541-544 take the view that "adjudicative processes" that OMB says are not a "dissemination" (67 F.R. 8460 col. 3 item 8) broadly sweep in a very large set of "informal administrative action". We urge that the set of excluded activities be made more narrow and that models, in particular, be susceptible to correction requests.

6. It seems internally inconsistent to state that web site data will not be subject to data quality mechanisms if it comes from "outside sources" (p. 13 line 426) but that if the same data is used by EPA as support for a rule, the data quality protections then begin to apply. (p. 17 line 554). We recommend that the same qualifying phrase be used on pages 13 and 17. Web site data submitted by one private person about another may be incorrect and misleading; if EPA then uses that submitted data and denies an opportunity to correct, under p. 13's view, it would be contrary to the OMB guidance, 67 F.R. 8454 col. 1.

7. As to the Request for Public Comments, we favor the phasing in of the "influential" category (p. 25); we recommend clarifying the term "robustness checks" (p. 25); and

we encourage the use of expert agency and other federal agency technical support in evaluating the merits of outside information (p. 26).

Thank you for considering these comments. If you wish clarification of any portions, please contact Professor James O'Reilly, Chair of the Committee on Government Information & Privacy, at (513) 556-0062.

Sincerely,

C. Boyden Gray
Section Chair