

The Paperwork Reduction Act

by Larry Becraft

Larry Becraft is a Huntsville, Alabama attorney. The following article was written in the 1980's and illustrates both a legal foundation for challenging the IRS, and the fact that these challenges are not new. Generally, the IRS response has been to ignore this kind of information, and simply keep on collecting the tax money, law or no law.

The Paperwork Reduction Act (herein "PRA") was approved on December 11, 1980.¹ This act required all federal agencies to submit to the Director of the Office of Management and Budget (O.M.B.) all "collections of information" for his approval and the assignment of O.M.B. control numbers.

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

Section 3507, subsection (f) provided: "An agency shall not engage in a collection of information without obtaining from the Director a control number to be displayed upon the information collection request."

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

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

The Senate Committee on Governmental Affairs summarized the purpose of § 3512 as follows:

"The purpose of this section is to protect the public from the burden of collections of information which have not been subjected to the clearance process described by §3507. Information collection requests which do not display a current control number or, if not, indicate why not are to be considered 'bootleg' requests and may be ignored by the public."²

The implementation of regulations for the PRA was hotly contested.³ The major issue of con-

cern related to whether agency *regulations* were subject to the requirements of the act, the federal agencies contending that only *forms* were covered by the act. This contention was rejected by O.M.B., which stated:

"It is not possible to argue that OMB clearance authority is confined to forms and similar instruments Many reporting requirements are enforced by means of forms, but other reporting requirements and virtually all record keeping requirements are imposed by other means, including oral surveys, guidelines, directives, and — most significantly — regulations The only way all reporting and record keeping requirements can be covered by the Act is to cover these other methods for the collection of information, including *regulations*."⁴ [Emph. add.]

"It follows that OMB has authority over reporting and record keeping requirements in rules that were in effect when the Act was passed as well as in rules subsequently issued with or without public notice and comment."⁵

"Pursuant to these authorities, the Director has concluded that all collections of information, including those mandated by regulations, must display a currently valid OMB control number,"⁶

The regulations for the PRA thus expressly subjected *regulations* adopted by agencies to the clearance process.⁷ The act clearly requires that forms seeking the collection of information must be approved by O.M.B. and must display O.M.B. control numbers. But, regarding the instances in which specific “reporting requirement” *regulations* would likewise be subject to the PRA, the report stated:

“As discussed in connection with section 1320.7(d), any collection of information specifically contained in a regulation (such as a form printed as part of a regulation) is considered part of the collection of information requirement imposed by that regulation, and does not need an additional approval. Such a collection must display the control number assigned to the collection of information requirement in the regulation. On the other hand, a form is not considered to be ‘specifically contained in’ a regulation merely because the regulation refers to or authorizes the form. A generally valid test is that the form requires independent clearance if the information collection component of the related regulation cannot be enforced without the form. For example, if a regulation states that respondents must supply certain data ‘on a form to be provided by the agency’, the form must be cleared independently.”⁸

In other words, if a reporting requirement regulation simply mentions a form, both the *regulation* and *form* must be separately approved by O.M.B., although both will display the same O.M.B. control number.

The regulations promulgated for the PRA on March 31, 1983, were specific in the requirements placed upon the information collection activities of federal agencies. Section 1320.4(a) of these regulations provided:

“An agency shall not engage

in a collection of information without obtaining Office of Management and Budget (OMB) approval of the collection of information and displaying a currently valid OMB control number and, unless OMB determines it to be inappropriate, an expiration date.”⁹

Section 1320.7 contained important definitions. A “collection of information” was defined as including forms and reporting requirements, the latter being defined as “a requirement imposed by an agency on persons to provide information to another person or to the agency”. By the plain terms of this definition, a “reporting requirement” encompasses a regulation which requires the provision of information. The “display” of OMB control numbers meant the printing of such number in the upper right hand corner on forms.

For *regulations*, the “display” of the control number was required to be a “part of the regulatory text or as a technical amendment”. Section 1320.14 of these regulations plainly commanded federal agencies to obtain and display O.M.B. control numbers for agency regulations subject to the act.

While most federal income tax forms (“information collection requests”) were approved and given O.M.B. control numbers prior to December 31, 1981, the same has not occurred regarding the reporting and record keeping *regulations* within 26 C.F.R. The most common, typical method to display an O.M.B. control number for regulations is to append at the regulation’s conclusion, “(Approved by the Office of Management and Budget under control number 0000-0000)”.

As of May, 1987, only 32 of the multitude of reporting and record keeping regulations in 26 C.F.R. displayed control numbers in this fashion. Those regulations and corresponding control numbers are:

Regulation in 26 C.F.R	Control Number:
1. 1.860-2	1545-0045
2. 1.860-4	1545-0045
3. 1.897-1	1545-0123
4. 1.901-2	1545-0746
5. 1.901-2A	1545-0746
6. 1.1256(h)-1T	1545-0644
7. 1.1256(h)-2T	1545-0644
8. 1.1256(h)-3T	1545-0644
9. 1.1441-2	1545-0795
10. 1.1441-3	1545-0795
11. 1.1441-4	1545-0795
12. 1.1441-5	1545-0795
13. 1.1441-6	1545-0795
14. 1.1441-7	1545-0795
15. 1.1445-7	1545-0902
16. 1.1461-1	1545-0795
17. 1.1461-2	1545-0795
18. 1.1461-3	1545-0257
19. 1.1462-1	1545-0795
20. 1.1502-13T	1545-0885
21. 1.6045-2T	1545-0115
22. 1.6046-1	1545-0794
23. 1.6050J-1T	1545-0877
24. 1.6050L-1T	1545-0908
25. 1.6151-1	1545-0257
26. 1.6154-4	1545-0257
27. 1.6302-1	1545-0257
28. 1.6302-2	1545-0257
29. 1.9200-2	1545-0767
30. 31.3401(a)(8)(A)-1	1545-0067
31. 31.3402(f)(1)-1	1545-0010
32. 31.3501(a)-1T	1545-0074 & 1545-0907

Regarding the federal income tax, the most important statutes requiring the provision of information to federal agencies such as the I.R.S. are found in 26 U.S.C. chapter 61. The general requirement to make returns (provide information) is found in §6011, which begins with the words, “when required by regulations prescribed by the Secretary”. Sections 6012 through 6021 do not require the filing of any specific returns, and the same applies for §§ 6031 through 6053. It is the corresponding *regulations* in 26 C.F.R. part 1 that require the making of specific returns. But, the most important regulations fail to meet the re-

quirements of the PRA since they do not display control numbers in the text of the regulations.

Specifically, 26 U.S.C. § 6012 says, “returns with respect to income taxes under subtitle A shall be made by the following” and then describes categories of individuals. This section’s failure to describe what information is required to be provided is a serious deficiency.¹⁰ Arguably, all that § 6012 requires is the making of a return which could be a simple letter containing only the statement, “this is a return”. It is the *regulations* for §6012 that require the making of Form 1040, yet these regulations *don’t display O.M.B. control numbers*.

Certainly, § 1.6012-1 is a “reporting requirement” and a “collection of information requirement” under the terms of the PRA, and should legally display a control number to be effective. The regulation at §1.6012-1 fails to display an O.M.B. control number in the manner required by the PRA regulations. Therefore, such regulation is unenforceable and PRA § 3512 is operative to prevent someone from being punished for violating this regulation.

The current regulations for the PRA prove the above contention precisely.¹¹ Section 1320.5 of this edition of the PRA regulations declares:

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

the phrase “will alert the public” is disingenuous since not one man in a hundred would realize the significance of a missing OMB number. This section creates a presumption that the public *will* be alerted by the absence of an OMB that the relevant rule or regulation has no legal force. Therefore, if the public proceeds to fill out the form or obey the “OMB-less” regulation anyway, their acts are presumed to be voluntary and therefore lawful and binding. In other words, this section effectively allows government to lawfully “trick” ignorant and trusting Americans into obeying invalid regulations.]

Whenever the collection of information, wherein neither the form nor the applicable regulation display O.M.B. control numbers, the public protection provisions of § 3512 apply. This proved to be true in *U. S. v. Smith*¹² which reversed a criminal conviction where neither the form nor the regulation in question had control numbers. See also *United States v. Hatch*¹³ which holds that a violation of the PRA is a *jurisdictional* impediment to the imposition of criminal penalties.

The application of the PRA to federal income tax laws, regulations and forms is just slightly different, and involves collections of information only partially in compliance with the PRA. Assuming that the federal income tax forms themselves comply with the PRA, still the fact that the sup-

porting and underlying collection of information requirement *regulations* fail to display such control numbers has a consequence. The purpose of both the PRA and its regulations is to insure that *all* collections of information properly display control numbers, and the only way to enforce this purpose is to punish incomplete compliance wherein an agency fails to obtain control numbers for its regulations but does obtain them for its forms.

The Paperwork Reduction Act’s (PRA) purpose is to insure that the collection of information by federal agencies has been sanctioned and approved by OMB, such approval evidenced by a currently valid control number. The control number contains 8 digits; the first four numbers represent the number for the agency in question and the second four numbers represent the number assigned to the “collection of information”. Examples of agency numbers are “1505” which designates the Department of the Treasury, “1512” which designates the Bureau of Alcohol, Tobacco and Firearms, “1515” which designates the Customs Service, and “1545” which designates the IRS.

A “collection of information” is typically a series of questions designed to collect facts or opinions. It is common for an agency regulation to precisely set forth the required information sought

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to be collected; the actual collection of information will occur by means of a form which carefully follows the language of the supporting regulation. As previously noted, both the regulation and the corresponding form will have the same O.M.B. control number.

It's also common for an agency regulation to seek the collection of information by a directive that compels a party subject to the regulation to file a specifically identified form. In this case, the regulation constitutes a "reporting requirement" which must be approved by O.M.B., and both the regulation and the corresponding form will have to be separately approved. Again, both will be given the same O.M.B. control number.

The reason for assigning the same control number to both the form and supporting regulation is for identification purposes so that regulations seeking information can be matched to the appropriate forms via the control number. For example, agency regulations often state that an unidentified form will be used to provide the information. Despite the regulation's silence on the form's designation, the agency knows which precise form is required by the regulation since the unspecified form must be given the same identical control number as the regulation.

Section 1441 of the Internal Revenue Code (IRC) deals with withholding of federal income tax from the income of nonresident aliens and foreign corporations. 26 C.F.R. §1.1441-5 was promulgated on the authority of §1441. As seen in the previous list, regulation §1.1441-5 displays within the body of the regulation the control number of "1545-0795". This regulation deals with parties *not subject to withholding* under §1441 of the Code, but the regulation itself fails to mention the name of the relevant form. However, the form which displays the same control number is Form

8233, entitled "Exemption from Withholding on Compensation for Independent Personal Services of a Nonresident Alien Individual". This illustrates that a regulation bearing a particular control number relates exclusively to the form also displaying the same control number.

Section 3401(a)(8)(A) of the IRC states that wages subject to withholding under chapter 34 of the Code does not encompass wages paid to U.S. citizens and residents entitled to the benefits under §911 of the Code. The corresponding regulation for this section is 26 C.F.R. §31.3401(a)(8)(A)-1, which deals with the same subject matter. The required form is not identified within the regulation, but the regulation does display control number "1545-0067". The Form which contains the same control number is Form 2555 -- "Foreign Earned Income". Again, the connection between regulations and forms via the O.M.B. control number appears self-evident.

If there was no such connection, a regulation requiring the filing of a particular form would not have the same control number as the form, yet repeatedly both forms and regulations have the same control number and they all "tie" together.

As enacted in 1980, the PRA clearly applied to all collections of information, including both forms and agency regulations. On September 8, 1982, O.M.B. promulgated proposed regulations for the PRA which clearly held that both forms and regulations were within the scope of the act.

However, at that time, a number of federal agencies had not submitted their agency regulations to O.M.B. for approval, notwithstanding the December 31, 1981, deadline. These agencies unsuccessfully opposed the O.M.B.'s effort to make regulations subject to the act.

The PRA required the "dis-

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play” of an assigned O.M.B. control number to be within the text of the regulation itself. The very first tax regulations having assigned and properly displayed O.M.B. control numbers were those involved with the promulgation of Treasury Decision (T.D.) 7898 on April 29, 1983.¹⁴ This T.D. involved new tax regulations 26 C.F.R., §§ 1.127-1 and 1.127-2. The latter was entitled “Qualified educational assistance program” and was assigned O.M.B. control number “1545-0768”.

The second Treasury Decision involving regulations which were assigned O.M.B. control numbers was T.D. 7919.¹⁵ This T.D. amended regulation §31.3402(q)-1, entitled “Extension of withholding to certain gambling winnings”, and this regulation was assigned O.M.B. control number “1545-0238”. Form W-2G has the same control number, and this form is entitled “Statement for recipients of certain gambling winnings”.

The third Treasury Decision to be approved with O.M.B. control numbers was T.D. 7915.¹⁶ This decision related to regulation §31.3402(m)-1, entitled “Withholding allowances”, and was assigned control number “1545-0010”. The form which bears the same control number is *Form W-4*, entitled “Employee’s withholding allowance certificate”. Without listing all similar regulations, it’s clear that Treasury and I.R.S. fully understood the requirement to obtain control numbers for regulations and to publish those control numbers within the text of the regulations as early as April, 1983.

As seen in the previous list, by May of 1987, there were only 32 tax regulations within 26 C.F.R. that contained control numbers within their text. However, regulations under the PRA permit the publication of control numbers assigned to agency regulations by “technical amendments”. Depending upon what a

“technical amendment” is, it may be that many of the tax regulations within 26 C.F.R. which are subject to the PRA have been assigned O.M.B. control numbers.

Nevertheless, PRA regulations also require that whenever a federal agency seeks an O.M.B. control number, notice of such action must be published in the Federal Register.¹⁷ Examination of the notices published by the I.R.S. in the Federal Register between the dates January 1, 1983, through March 14, 1985, indicates that the I.R.S. failed to comply with the Federal Register publishing requirement except for those 32 tax regulations listed above.

However, on March 14, 1985, Treasury Decision 8011 was published.¹⁸ This Treasury Decision purports to comply with the PRA regulations and alleges that it is a list of control numbers assigned by O.M.B. to the tax regulations within 26 C.F.R. which are subject to the PRA. If this T.D. which created 26 C.F.R. §602.101 is indeed valid, its analysis reveals much about what tax forms are required to be filed.

The PRA requires the assignment of a single O.M.B. control number to a single “collection of information”. Obviously, one request will not be assigned two different control numbers. For regulations, O.M.B. exercises approval only for that portion of a regulation which requests information; it doesn’t exercise any authority over any other portion of a regulation.¹⁹ For a regulation requiring the provision of information via a particular form, O.M.B. assigns the same control number to that regulation as to the form. Thus, a single “collection of information” encompasses the form in question and *all* regulations bearing the *same* control number.

The first glance, 26 C.F.R. §602.101 appears to be nothing

more than a tabular list of cites to tax regulations in one column and corresponding O.M.B. control numbers in an opposing column. In essence, part 602 alleges that O.M.B. has assigned the designated control number to the designated tax regulation. However, to properly understand part 602, it is necessary to catalog *all* regulations having the *same* control number.

Section 6012 of the IRC concerns the *making* of income tax returns, and the corresponding tax regulation is §1.6012-1. Part 602 reveals that regulations “1.6012-0 through 1.6012-6” have been assigned control number “1545-0067”. Part 602 also discloses that regulation §1.6012-1 has been assigned three control numbers, including “1545-0074”. Below, there is a list of all regulations within part 602 which have been assigned these control numbers.

Analysis of this list of regulations which have been assigned control number “1545-0074” reveals that virtually all of these regulations relate only to the *type* of information to be disclosed on a return. Only two regulations (1.931-1 and 1.935-1) bearing this control number require the *filing* of this return by a specified class of people who are U.S. citizens residing in the insular possessions (Guam, Puerto Rico, & Virgin Islands). The form which displays this particular control number is the *Form 1040*.

Treasury Regulation 1.1-1 contains a “reporting requirement” subject to the PRA:

“In general, the tax is payable upon the basis of returns rendered by persons liable therefor . . . or at the source of the income by withholding.”

The O.M.B. has assigned control number “1545-0067” for this reporting requirement, the corresponding form Form 2555 (“Foreign Earned Income”), and regulations “1.6012-0 through 1.6012-6”.

Note that §6091 of the Code fails to identify any specific and definite filing requirement, and the section itself is enforceable only by regulations promulgated by the Secretary. 26 C.F.R., §1.6091-2, presents the “reporting requirement” that income tax returns should be submitted to either district directors or service centers. However, although all regulations issued pursuant to 26 C.F.R. §6091 are clearly information collection requests subject to the PRA, none of them properly display O.M.B. control numbers as demanded by PRA regulations.

The proof that all regulations under §6091 are classified as “reporting requirements” is found at 5 C.F.R. §1320.7 which concerns definitions of *reporting* requirements and *recordkeeping* requirements. Both of these are classified as “information collection requests”. The terms “reporting and recordkeeping requirements” are commonly used and understood by all federal agencies. In fact, in the C.F.R. index, the general topic of “Reporting and Recordkeeping Requirements” is 72 pages long and includes the regulations under §6091.

Since the regulations at 1.6091-1, 1.6091-2, 1.6091-3 and 1.6091-4 are “reporting requirements” and thus subject to the PRA, the enforceability of these regulations depends upon the display of O.M.B. control numbers within their text. Since these regulations do not presently display the control numbers properly, people who ignore these alleged regulatory “requirements” are protected from liability by the provisions of PRA §3512.

Enforceability of regulations under §6091 does not change even when 26 C.F.R., § 602.101, is taken into consideration. The following list contains all regulations of whatever type issued

pursuant to §6091 of the Code, and the control number assigned to such regulations by part 602 appear in the opposing column:

Sect. 6091 Regulations	Part 602 Control No.
1.6091-1.	None
1.6091-2.	None
1.6091-3.	1545-0089 (1040NR)
1.6091-4.	None
20.6091-1.	1545-0015 (706)
25.6091-1.	1545-0020 (709)
31.6091-1.	1545-0028 (940)
	1545-0029 (941)
301.6091-1.	None

This list shows that the very regulations on which the prosecution relies to assert that the Defendant had a duty to file some income tax return does not and never has had any assigned O.M.B. control number. Therefore, the duty to comply with this particular regulation has no real force of law and the same may be ignored by the public with impunity.

Attorney Becraft’s conclusion may be legally correct, but I doubt that any alleged IRS regulation can be “ignored with impunity”. There’s too much evidence of IRS behavior that can be characterized as abusive or even criminal to suppose the IRS feels obligated to understand or obey the law. If you’re going to tangle with the IRS, you’d best do your homework but still recognize your most dangerous adversaries may be

overconfidence in your understanding of the law or any personal belief that the IRS and courts feel obligated to obey it.

¹ see Public Law 96-511, 94 Stat. 2812, codified at 44 U.S.C., § 3501, et. seq.

² See Senate Report No. 96-930, 1980 U.S. Code Cong. and Admin. News 6241, at 6292.

³ see preliminary remarks to such regulations, 48 Fed. Reg. 13666 (March 31, 1983).

⁴ Id., at 13667.

⁵ Id., at 13668.

⁶ Id., at 13669.

⁷ see 5 C.F.R., § 1320.14.

⁸ Id., at 13682.

⁹ (48 Fed. Reg. 13689), 5 C.F.R., part 1320.

¹⁰ see *Viereck v. United States*, 318 U.S. 236, 63 S. Ct. 561 (1943).

¹¹ see 53 Fed. Reg. 16623, May 10, 1988.

¹² 866 F.2d 1092 (9th Cir. 1989)

¹³ 919 F.2d 1394 (9th Cir. 1990)

¹⁴ see 48 Fed. Reg. 31015 (July 6, 1983), 1983-2 C.B. 34.

¹⁵ approved May 5, 1983; see 48 Fed. Reg. 46296 (October 12, 1983), 1983-2 C.B. 213.

¹⁶ approved May 18, 1983; see 48 Fed. Reg. 44072 (September 27, 1983), 1983-2 C.B. 174.

¹⁷ see 5 C.F.R., §1320.12.

¹⁸ see 50 Fed. Reg. 10221, 1985-1 C.B. 397, 26 C.F.R. §602.101.

¹⁹ see *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77 (D.C. Cir. 1991).

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