

Government Misinformation: How Congress Can Get Agencies to Address the Problem

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KEY TAKEAWAYS

The Information Quality Act (IQA) is supposed to ensure that federal agencies disseminate accurate and credible information.

Unfortunately, the IQA has not worked as intended, largely because there has been no way to effectively ensure that agencies comply with the law.

Congress should clarify that IQA actions are judicially reviewable and establish clear and enforceable requirements for agencies.

A great deal of attention has recently been paid to the dissemination of misinformation, especially by private actors. But what happens when the federal government is the one disseminating the misleading or inaccurate information?

This is far from a new concern. In fact, Congress has long understood the problems of federally disseminated misinformation. In 2000, Congress passed the Information Quality Act (IQA), a law that is supposed to ensure that federal agencies disseminate accurate and credible information.¹ To help accomplish this objective, Congress empowered the public to serve as a check on agencies by allowing people to seek and obtain a correction of disseminated information. Regrettably, as applied in practice and due to court opinions, the IQA has not worked as intended, largely because there has been no way to effectively ensure that agencies comply with the law.

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By taking some simple steps, Congress can significantly promote confidence in government information and the regulations issued by agencies that rely upon this information.

The Importance of Accurate Government-Disseminated Information

The federal government plays a unique and important role in the dissemination of information. When federal agencies disseminate information, from recommendations regarding the pandemic to the impact of air pollution, they are shaping the public's understanding of issues and forming conventional wisdom. The federal government's "seal of approval" provides significant credibility to the disseminated information in the eyes of the public. As a result, the federal government disseminating information will likely have far more impact than if private actors disseminated the same information.

More important, though, government-disseminated information, particularly scientific information, commonly shapes regulations that impact almost every facet of life. When costly regulations are imposed on society, this can be controversial enough even when they achieve a beneficial purpose. However, there is no benefit from regulations that were wrongly issued in the first place due to incorrect information. In such situations, only costs result, and by relying on the misinformation, federal agencies have foregone other possible solutions they could have adopted, including choosing not to pursue government intervention in the first place. Once regulations are on the books, they are not easily removed, and thus the costs associated with the flawed regulations, and any future regulations built upon their flawed foundation, will also be difficult to remove.

Brief Overview of the IQA²

The IQA requires agencies to (1) ensure and maximize the quality of disseminated information, (2) establish procedures for people³ to seek and obtain correction of information, and (3) provide reports regarding IQA complaints to the Office of Management and Budget (OMB).

The IQA directed the OMB to develop government-wide guidelines that federal agencies must use to implement the requirements of the law. In 2002, the OMB published the "OMB Guidelines" laying out requirements for federal agencies.⁴ A key requirement is that the substance of government-disseminated information be accurate, reliable, and unbiased.⁵ In

addition, information must also be *presented* in a manner that is “accurate, clear, complete, and unbiased,” which involves providing information in the proper context and making it possible for the public to evaluate the credibility of information.⁶

In 2004, the OMB issued its “Final Information Quality Bulletin for Peer Review” (“Peer Review Bulletin”), which was intended “to enhance the quality and credibility of the government’s scientific information.”⁷ The document created peer-review standards for two types of information: “influential scientific information” and “highly influential scientific assessments.”⁸

If the public believe that disseminated information is flawed or has otherwise not met IQA requirements, then they can submit requests for correction to agencies.⁹ The agencies then provide initial responses to these requests. If the parties requesting the corrections are not satisfied, then they can then submit appeals¹⁰ to the agencies.¹¹

Key Problems with the Application of the IQA

The IQA has helped to correct some government misinformation, but it is not reaching its potential to address the dissemination of misinformation. The following are just some of the primary problems:

No Judicial Review. To date, courts have not found agency IQA actions to be judicially reviewable.¹² As a result, courts are not serving as a necessary check to ensure agency compliance and the public is discouraged from making requests to correct misinformation.

Lack of Clear Requirements in the OMB Guidelines and Peer Review Bulletin. While the OMB created some requirements for agencies in both the OMB Guidelines and the Peer Review Bulletin, it provided far too much agency discretion. For example, in the OMB Guidelines, agencies are directed to allow people “to seek and obtain, *where appropriate*, correction of information.”¹³ For some courts, this “where appropriate” language has led them to conclude that it is up to the agencies when, and if, to correct misinformation. As a result, these courts have concluded that the law creates no judicially enforceable standard,¹⁴ and therefore the agency actions are not judicially reviewable.¹⁵

The Peer Review Bulletin contains far too many recommendations and far too few genuine requirements (i.e., requirements that do not give agencies the discretion to determine whether and how to comply). In fact, some of the requirements provide so much discretion to agencies that they are not really requirements at all. For example, the OMB does not require

agencies to conduct their own, additional peer review of influential scientific information if the prior peer review, such as by academic journals, has been deemed adequate.¹⁶ However, since the OMB did not provide any clear requirements as to what constitutes adequacy, agencies can subjectively decide when prior peer review has been adequate.¹⁷

Agency Avoidance of Peer Review. Agencies determine whether information is “influential scientific information,” and agencies or the OMB determine whether information is a “highly influential scientific assessment.”¹⁸ These designations are critical because they trigger the IQA peer-review requirements. By allowing agencies or the OMB to make these discretionary decisions, the Peer Review Bulletin allows its requirements to be easily avoided. In a particularly egregious example, the Environmental Protection Agency (EPA) has still not classified the technical support document used to inform its greenhouse gas endangerment finding as a highly influential scientific assessment. In fact, the EPA has disputed that it is even a scientific assessment.¹⁹ This is despite the fact that, in 2011, the EPA’s own inspector general concluded that the technical support document was a highly influential scientific assessment (and a scientific assessment).²⁰

Press Release Exception. The OMB Guidelines stated that information disseminated through press releases was not covered by the law. Some agencies have expanded this to include fact sheets and information often disseminated in conjunction with press releases. Agencies can use this exception to avoid information-quality requirements by simply disseminating information through these publication formats.²¹ From the outset, the OMB recognized the problem with this exception, recommending that agencies narrow the exception so that the IQA would cover press releases in many situations.²²

Commonsense Solutions for Congress

The following are specifically focused on addressing some of the most glaring IQA problems. Congress should:

- **Clarify that IQA actions are judicially reviewable through the Administrative Procedure Act.** Unless agencies recognize they may have to go to court, the IQA will never properly address government misinformation. This solution is not intended to empower judges to make policy decisions or to second-guess policy decisions. Rather, they would merely focus on whether the information supporting those

decisions was accurate, reliable, and unbiased, and presented clearly and completely.²³ Courts would also review whether agencies have met procedural requirements when disseminating information. These requirements should be clear-cut and therefore easy to determine if they have been met.

- **Ensure that the OMB Guidelines and Peer Review Bulletin set clear requirements.** Both the OMB Guidelines and Peer Review Bulletin should establish clear requirements that do not give agencies discretion in terms of how and whether to comply. This would help agencies with compliance, improve information quality, and make it easier to evaluate agency compliance. The OMB should certainly not turn congressional mandates into suggestions for agencies.
- **Create automatic triggers for when peer-review standards must be met.** Neither agencies nor the OMB should be able to get around the peer-review requirements for influential scientific information and highly influential scientific assessments. Congress should establish automatic and objective triggers when information must meet peer-review standards. This would include identifying regular and significant agency actions where peer review will always be needed, such as the EPA's setting of ambient air quality standards. Congress should list these specific situations in statute.²⁴ In general, Congress should be overinclusive in the use of agency peer review, especially given the importance of influential disseminated information and the many problems that exist with the academic peer-review process.²⁵
- **Remove the exception for press releases and similar documents.** Agencies should not be able to get around information-quality requirements by disseminating information in an exempted publication format. This exception is especially problematic since the public and media likely get most of their government information from press releases and fact sheets.²⁶ Publication formats should be exempted only if they are communicating non-substantive information, such as meeting notices or announcements that explain the existence of the disseminated information.

Conclusion

Under the Freedom of Information Act (FOIA), the public is empowered to request records containing government information and to go to court if the records are not provided. Similarly, the IQA should be viewed as a related law that allows the public to ensure that government information is accurate and that people have access to courts in the same manner allowed by FOIA.

When the public can provide this genuine check on agencies, federal agencies will finally feel accountable for meeting sound information-quality practices and correcting mistakes, which will invariably be made. Such a system will yield major benefits by preventing the dissemination of misinformation in the first place and correcting misinformation before it becomes conventional wisdom or the foundation for harmful regulations.

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Endnotes

1. See Fiscal Year 2001 Consolidated Appropriations Act, § 515, Public Law No. 106–554, <https://www.govinfo.gov/content/pkg/PLAW-106publ554/pdf/PLAW-106publ554.pdf> (accessed August 25, 2021). The IQA was enacted as Section 515 of the Treasury and General Government Appropriation Act for fiscal year 2001.
2. This overview is barely scratching the surface of the IQA, as it has been applied in practice. For a detailed analysis of the IQA, see Daren Bakst, “Strengthening the Information Quality Act to Improve Federally Disseminated Public Health Information,” *Food and Drug Law Journal*, Vol. 75 (2020), p. 234, <https://ssrn.com/abstract=3753181> (accessed August 25, 2021).
3. The specific term used is *affected persons*. In practice, this term has rightfully been broadly interpreted, and the OMB has explained that agencies should take a very broad approach.
4. “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication,” *Federal Register*, Vol. 67, No. 36 (February 22, 2002), p. 8452, <https://www.federalregister.gov/documents/2002/02/22/R2-59/guidelines-for-ensuring-and-maximizing-the-quality-objectivity-utility-and-integrity-of-information> (accessed August 25, 2021) Hereafter, “OMB Guidelines.”
5. OMB Guidelines, and see also Curtis W. Copeland and Michael Simpson, “The Information Quality Act: OMB’s Guidance and Initial Implementation,” Congressional Research Service *Report for Congress*, August 19, 2004, <https://fas.org/sgp/crs/RL32532.pdf> (accessed August 25, 2021).
6. Former OMB economist Richard Belzer has provided a useful distinction to explain the substance and presentation distinction: “Information can be ‘accurate, reliable, and unbiased’ (‘Earth will be consumed when the sun becomes a red giant’) but presented in a way that lacks context or is otherwise highly misleading (‘this natural process will not occur for several hundred million years’).” Richard B. Belzer, “Strengthening the Information Quality Act to Improve Transparency and Regulatory Quality,” *Federalist Society*, April 30, 2021, <https://fedsoc.org/commentary/fedsoc-blog/strengthening-the-information-quality-act-to-improve-transparency-and-regulatory-quality> (accessed August 25, 2021).
7. Office of Management and Budget, “Final Information Quality Bulletin for Peer Review,” Memo No. M-05-03, December 16, 2004, <https://georgewbush-whitehouse.archives.gov/omb/memoranda/fy2005/m05-03.pdf> (accessed August 25, 2021). The final Peer Review Bulletin was published in the *Federal Register* in January 2005.
8. *Ibid.*
9. Just some examples of government disseminated misinformation include recent inconsistent information provided during the pandemic, Centers for Disease Control and Prevention (CDC) overestimates of 2017–2018 influenza deaths, federal Dietary Guidelines misinformation on total fat consumption, and inaccurate Food and Drug Administration (FDA) and CDC information about salmonella and tomatoes. Plus, while the IQA has not achieved the desired results, agencies have made corrections of misinformation. “[R]equests for correction have led to, among other things:
 - “Removing incorrect information regarding smokeless tobacco;
 - “Updating information and removing outdated information regarding bicycle helmet safety;
 - “Revising the CDC’s Phthalates Chemical Factsheet to properly communicate the plastic products that contain these chemicals;
 - “Revising a press release and fact sheet regarding the National Toxicology Program’s Report on Carcinogens to correct incorrect information on Styrene-7,8-oxide; and
 - “Properly attributing authorship of influential research on artificial trans fat used by FDA to individual authors, not the CDC.”Bakst, “Strengthening the Information Quality Act.” See also Dariush Mozaffarian and David S. Ludwig, “The 2015 US Dietary Guidelines—Ending the 35% Limit on Total Dietary Fat,” *Journal of the American Medical Association*, Vol. 313, No. 24 (2015), pp. 2421–2422, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6129189/> (accessed August 25, 2021), and Administrative Conference of the United States, *Agency Publicity in the Internet Era*, September 25, 2015, <https://www.acus.gov/sites/default/files/documents/agency-publicity-in-the-internet-era.pdf> (accessed August 25, 2021).
10. “The Guidelines clarify, ‘the office that originally disseminates the information does not have responsibility for both the initial response and resolution of a disagreement.’ In its new 2019 guidance to improve implementation of the IQA, OMB provided additional clarity on the correction process. For example, OMB indicated that agencies should not take more than 120 days to respond to requests for correction. In addition, individuals involved in reviewing and responding to initial requests for correction should not be the same individuals hearing the appeal.” Bakst, “Strengthening the Information Quality Act.” Despite these efforts to create a more independent and objective process, the process still involves the agency as both the one providing the initial response and hearing the appeal.
11. They may appeal the decisions to federal district court.
12. For more detail on judicial review and the IQA, see, for example, James W. Conrad Jr., “The Information Quality Act—Antiregulatory Costs of Mythical Proportions?,” *Kansas Journal of Law and Public Policy*, Vol. 12 (2003), p. 521; William Kelly Jr., “A Closer and More Current Look at the ‘Information Quality Act,’ Its Legislative History, Case Law, and Judicial Review Issues,” March 2018, <https://ssrn.com/abstract=3122670> (accessed August 25, 2021); and Lawrence A. Kogan, “Revitalizing the Information Quality Act as a Procedural Cure for Unsound Regulatory Science: A Greenhouse Gas Rulemaking Case Study,” *Washington Legal Foundation*, February 6, 2015, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561619 (accessed August 25, 2021). For some specific cases, see, for example, *Mississippi v. EPA*, 744 F. 3d 1334 (D.C. Cir. 2013); *Prime Time International Co. v. Vilsack*, 599 F.3d 678 (D.C. Cir. 2010); *Americans for Safe Access v. HHS*, 399 F. App’x 314 (9th Cir. 2010); and *Salt Institute v. Leavitt*, 440 F.3d 156 (4th Cir. 2006).

13. OMB Guidelines (emphasis added).
14. See, for example, Kelly, “A Closer and More Current Look,” pp. 32–71 for a detailed discussion on how agencies and district courts have used the OMB’s discretionary language to avoid judicial review.
15. There are many problems with this interpretation, including the fact that the IQA legislative text does not say that securing and obtaining the correction of information is optional for agencies. These are requirements that the OMB and agencies are supposed to implement. Based on a reasonable reading of the entire OMB Guidelines and all of the OMB’s work on the IQA, even the OMB did not intend such a result. See also Kelly, “A Closer and More Current Look,” pp. 72–75.
16. The OMB does require agencies to conduct their own, additional peer review of highly influential scientific assessments, except in limited circumstances. This additional peer-review requirement should apply to influential scientific information as well. The limited exceptions should not apply for either highly influential scientific assessments or influential scientific information. For more on the exceptions, see Bakst, “Strengthening the Information Quality Act.”
17. Final Peer Review Bulletin. For a more detailed discussion of the problems with the lack of clear and objective requirements, see Bakst, “Strengthening the Information Quality Act.”
18. According to the Final Peer Review Bulletin, influential scientific information is “scientific information *the agency* reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions” (emphasis added). A “highly influential scientific assessment” is influential scientific information that *the agency or the [OMB’s Office of Information and Regulatory Affairs] administrator* determines to be a scientific assessment that “could have a potential impact of \$500 million or more in any year” or “is novel, controversial, or precedent-setting or has significant interagency interest.”
19. Bakst, “Strengthening the Information Quality Act.”
20. EPA, *Procedural Review of EPA’s Greenhouse Gases Endangerment Finding Data Quality Processes*, September 26, 2011, <https://www.epa.gov/sites/production/files/2015-10/documents/20110926-11-p-0702.pdf> (accessed August 25, 2021).
21. Bakst, “Strengthening the Information Quality Act.”
22. John D. Graham, “Memorandum for President’s Management Council,” June 10, 2002, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/iqg_comments.pdf (accessed August 25, 2021).
23. In other words, courts would be ensuring that the information meets the IQA’s “objectivity” requirements. To the extent there is any subjectivity in evaluating disseminated information (not policy decisions), Congress could clarify that courts should assess whether agencies have drawn conclusions that are reasonably supported by the evidence. This is akin to the substantial evidence standard. Substantial evidence means “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” See, for example, *Richardson v. Perales*, 402 U.S. 389, 401 (1971).
24. The automatic and objective triggers should include standards to apply across the government, because any list of agency-specific actions identified in statute would not be exhaustive. For more on how these triggers could work, see Bakst, “Strengthening the Information Quality Act.”
25. For the numerous problems with peer review, see, for example, Bakst, “Strengthening the Information Quality Act,” and Daren Bakst and Katie Tubb, “A Proactive Environmental Policy Agenda for Congress and the Administration,” Heritage Foundation *Backgrounder* No. 3555, November 2, 2020, <https://www.heritage.org/environment/report/proactive-environmental-policy-agenda-congress-and-the-administration>.
26. The IQA guidelines also inappropriately exempts agency testimony.