

only to the use of "person" in the context of "ten or more persons." In addition, the definition retains the "third-party" disclosure language found in existing § 1320.7(c)(2). OMB's interpretation of "collection of information" to include third-party disclosures had been rejected by the Supreme Court in *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990), but was reaffirmed by Congress in the 1995 Act (see 44 U.S.C. 3502(3)). In this regard, one non-substantive change has been made. The reference to "disclosure requirements" in existing § 1320.7(c)(1) has been replaced by "posting, notification, labeling, or similar disclosure requirements" in proposed new § 1320.3(c)(1), in order to parallel the formulation in proposed new § 1320.3(c)(2) ("through posting, notification, labeling or similar disclosure requirements"), which is taken from existing § 1320.7(c)(2).

Proposed § 1320.3(d): This paragraph defining "conduct or sponsor" is equivalent to existing § 1320.7(r) ("Sponsor"), which defined both the conducting, and the sponsoring, of a collection of information. The definition is amended to reflect the legislative changes in 44 U.S.C. 3502(3)(A).

Proposed § 1320.3(e) defining "Director" is equivalent to existing § 1320.7(d).

Proposed § 1320.3(f): This paragraph defining "display" is equivalent to existing § 1320.7(e), but is amended in several ways to clarify that "display" can be interpreted in common-sense ways appropriate for electronic media, the **Federal Register**, and the Code of Federal Regulations. As the Conference Report explains, "[f]or collections of information contained in a rule, agencies must provide the required information in a manner reasonably calculated to inform the public. Notice may be provided in the preamble to a final rule containing the collection of information, or in a general notice in the volume of the Code of Federal Regulations in which the agency's regulations appear." H. Rep. 104-99, p. 37. These examples are illustrative; the information may also be set forth, as in existing § 1320.5(e)(2), in the regulatory text of the final rule (including through a technical amendment), or, as in proposed new § 1320.3(f)(2), in a separate notice in the **Federal Register** announcing OMB approval.

Proposed § 1320.3(g) defining "independent regulatory agency" is equivalent to existing § 1320.7(h).

Proposed § 1320.3(h): This paragraph defining "information" and the subparagraphs defining exemptions thereto are, with two changes, identical

to existing § 1320.7(j). The exemption for "certifications" in existing § 1320.7(j)(1) is clarified in order to ensure that the exempted certification is used only to identify an individual in a routine, non-intrusive, non-burdensome way. The exemption will not be available for a certification that substitutes for a collection of information to collect evidence of, or to monitor, compliance with regulatory standards.

Proposed § 1320.3(i) defining "OMB" is added for clarity.

Proposed § 1320.3(j) defining "penalty" is equivalent to existing § 1320.7(m). The word "penalty" is used in proposed § 1320.6, and is based on 44 U.S.C. 3502(14).

Proposed § 1320.3(k): This paragraph defining "person" is equivalent to existing § 1320.7(n), except that the last two sentences in existing § 1320.7(n) have been moved to proposed § 1320.3(c)(4) ("collection of information"). The purpose for placing the limitations on the definition of "person" into proposed § 1320.3(c)(4) is to make it clear that the limitations in paragraph (c)(4) apply only to the use of the word "person" in the context of "ten or more persons."

Proposed § 1320.3(l): This paragraph defining "practical utility" is equivalent to existing § 1320.7(o), but is amended in the final sentence to incorporate the definition of "general purpose statistics" in existing § 1320.7(i).

Proposed § 1320.3(m): This paragraph defining "recordkeeping requirement" is equivalent to existing § 1320.7(p), but is amended to reflect the legislative changes in 44 U.S.C. 3502(13). As with the definition of "collection of information" in existing § 1320.5(p), although less explicitly, the definition of "recordkeeping requirement" in existing § 1320.7(p) included requirements that persons maintain information for third parties. The precise scope of existing § 1320.5(p) was placed into some question by the Supreme Court's decision in *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990). However, in *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77 (D.C. Cir.), cert. denied, 502 U.S. 938 (1991), the Court of Appeals for the District of Columbia Circuit rejected a broad reading of *Dole*, in the context of a requirement to maintain (rather than disclose) information for third parties. In the 1995 Act, Congress clarified the scope of "recordkeeping requirement" in 44 U.S.C. 3502(13).

E. Proposed Section 1320.4—Coverage

Proposed § 1320.4 is equivalent to existing § 1320.3, but is amended to reflect the legislative rewording in 44 U.S.C. 3502(3)(B) and 3518(c)(i)(D). No substantive change is intended in this section.

Paragraph (b) is based on 44 U.S.C. 3518(c)(2). Agencies from time to time investigate general operations of their programs, to assess factors including performance against statutory or regulatory objectives, the effectiveness of financial systems, or the efficiency of automated data systems. These programmatic reviews often involve surveys or other means of posing identical questions to ten or more persons without a focus on "specific individuals or entities." Under 44 U.S.C. § 3518(c)(2) and proposed paragraph 1320.4(b), the collection of information during such general programmatic investigations (other than information collected in an antitrust investigation, as specified) are covered by the Act when "undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry." However, as is made clear in 44 U.S.C. § 3518(c)(1)(B)(ii) and proposed paragraph 1320.4(a)(2), investigations are exempt from the Act when they involve "an agency against specific individuals or entities."

Thus, for example, the Act does *not* apply to a law enforcement investigation to determine whether persons are in compliance with the law. See, e.g., *Phillips Petroleum Co. v. Lujan*, 963 F.2d 1380, 1382-83, 1386-87 (10th Cir. 1992) (Paperwork Act does not apply to "an audit of the propriety of the royalty and other payment made by" two mineral lessees; the audit "clearly falls within the parameters of th[e] exemption" for "an administrative action or investigation involving an agency against specific individuals or entities"); *United States v. Saunders*, 951 F.2d 1065, 1066-67 (9th Cir. 1991) (Paperwork Act does not apply to an IRS summons; "An IRS investigation of a taxpayer's failure to file her or his income tax return constitutes 'an agency action against specific individuals.'"); *Lonsdale v. United States*, 919 F.2d 1440, 1444-45 (10th Cir. 1990) (same as *Saunders*; "the Paperwork Reduction Act is inapplicable to 'information collection request' forms issued during an investigation against an individual to determine his or her tax liability"). However, the Act *does* apply to a general programmatic investigation to determine whether the agency's program achieves its statutory objectives.