

protection provision does not apply to noncompliance with collections of information imposed on persons by statute. The preamble (at 30441) explains that the scope of this provision is limited to collections of information imposed 'on persons *directly* by statute' and 'does not extend to situations in which a statute * * * directs an agency to impose a collection of information on persons, and the agency does so.'" (Emphasis supplied in comment.) According to the comment, "This distinction * * * is not supported by the case law," which in this commenter's view, "simply distinguishes collections of information mandated by Congress in statute from those imposed by regulation under an agency's discretionary authority." For this reason, the comment concluded that proposed § 1320.6(e) was too narrowly drawn, and should be broadened: "Thus, the scope of section 1320.6(e) should cover all collections of information specifically mandated by statute, regardless of whether Congress imposes them on persons directly or through an agency."

With respect to the criticism that proposed § 1320.6(e) is too broad, OMB did not intend in proposed § 1320.6(e) or in the preamble of the NPRM to suggest that the requirements of the Paperwork Reduction Act do not apply to agency paperwork requirements that implement mandates that Congress imposes on persons. We agree with these comments that the legislative history to the Paperwork Reduction Act of 1980 indicates the Act's broad coverage with respect to agency collections of information: "Unless the collection of information is specifically required by statutory law the Director's determination is final for agencies which are not independent regulatory agencies. The fact the collection of information is specifically required by statute does not, however, relieve an agency of the obligation to submit the proposed collection for the Director's review" (S. Rpt. 96-930, at p. 49).

Accordingly, OMB's 1983 regulations implementing the 1980 Act stated that "OMB will consider necessary any collection of information specifically mandated by statute or court order, but will independently assess any collection of information to the extent that the agency exercises discretion in its implementation" (5 CFR 1320.4(c)(1) (1984)). This provision has remained in OMB's regulations since then. Moreover, it was included in the proposed rule at § 1320.5(e)(1), where it is found in the final rule issued today.

OMB's intention in proposed § 1320.6(e) was therefore not to exempt

any agency collections of information from the requirements of the Paperwork Reduction Act. Instead, our intention was to address the consequences under the Act's public protection provision if an agency fails to comply with the Act's requirements with respect to a particular collection of information. In the cases that OMB discussed in the NPRM, the courts held that an agency's failure to comply with the Act cannot preclude the enforcement of a requirement that Congress in a statute has imposed on persons. The reason for this conclusion, as those courts explained (see 60 FR 30441), was that Congress did not subject its law-making process to the requirements of the Paperwork Reduction Act.

In other words, Congress in the Paperwork Reduction Act did not provide that Congress must comply with the Act's requirements, which include seeking and obtaining OMB approval (and periodic reapproval), when Congress passes a law that imposes paperwork requirements on the public. OMB does not review laws for compliance with the Paperwork Act, and thus, laws do not have to display OMB control numbers and do not require subsequent OMB review and approval at least once every three years.

This is not to say that an agency's implementing forms, regulations, and other directives to the public are exempt from the Act's requirements; those implementing forms, regulations, and directives are indeed subject to the Act's requirements. However, it does mean that an agency's failure to comply with the Act cannot preclude the enforcement of a statute that imposes paperwork requirements on persons. Otherwise, agency officials, by failing to satisfy their statutory obligations, would have the power to nullify a requirement that Congress imposes on persons by statute. The Act's public protection provision does not have such a reach.

Accordingly, as we have clarified above, proposed § 1320.6(e) does not exempt any agency collections of information from the Act's requirements. We believe that, with this clarification, we have addressed the main concerns that were expressed by the three commenters who considered proposed § 1320.6(e) to be too broad. To the extent that the comments are suggesting that the Act's public protection provision precludes the Government from enforcing duties that Congress imposes on persons by statute, we believe that the Act does not support such an interpretation, for the reasons outlined above.

With respect to the one comment that criticized proposed § 1320.6(e) as being

too narrow, we believe that the suggestion in this comment is contrary to the Congressional intent behind the Act's public protection provision and is contrary to administrative practice generally. As noted above, this comment asserts that the case law discussed in the proposed rule's preamble "simply distinguishes collections of information mandated by Congress in statute from those imposed by regulation under an agency's discretionary authority." According to the comment, "the scope of section 1320.6(e) should cover all collections of information specifically mandated by statute, regardless of whether Congress imposes them on persons directly or through an agency." In other words, whereas OMB's proposed § 1320.6(e) stated that the public protection provision does not apply to paperwork requirements that Congress imposes upon persons by statute, the commenter's view is that the public protection provision also does not apply to any paperwork requirement that an agency imposes on persons in response to a statutory requirement that the agency impose such a requirement.

OMB does not agree with this reading of the Act. As we explained above, statutes are not subject to the Paperwork Reduction Act. Therefore, Congress does not have to seek and obtain OMB approval for the statutes that Congress enacts, and the Act's public protection provision cannot preclude the enforcement of a statute that imposes paperwork requirements on persons. It is an entirely different matter when Congress in a statute requires an agency to impose a paperwork requirement on persons.

In this regard, moreover, the comment's suggested reading of the public protection provision would substantially narrow its scope. Agencies impose many collections of information in response to mandates that they receive from Congress (although, as OMB's regulation indicates, see § 1320.5(e)(1), these mandates may leave agencies with varying degrees of discretion). Nothing in the Act's public protection provision supports the comment's suggested distinction between agency action that is "mandated by Congress" and agency action that is "discretionary," just as there is no such distinction in the Administrative Procedure Act.

In sum, an agency's failure to comply with the Paperwork Reduction Act cannot override a statutory obligation on persons that Congress imposes on persons through statute. By contrast, an agency's failure to comply with the requirements that Congress imposes on the agency in one statute (in this case,