

Re: Docket ID No. EPA-HQ-OA-2018-0259;

FRL-10004-72-ORD.

RIN 2080-AA14

Strengthening Transparency in Regulatory Science

AGENCY: Environmental Protection Agency (EPA).

ACTION: Supplemental notice of proposed rulemaking.

To the EPA Acting Administrator:

1. *Your Proposed Notice of Supplemental Rulemaking is new rulemaking, not a revision of any prior proposal. As such, it simply does not fall within your agency "housekeeping authority." Moreover, your proposed new rulemaking does not meet the requirements of the Administrative Procedure Act.*

Your Proposed Notice of Supplemental Rulemaking recites on its face that you want to add a definition of "publicly available." This in itself is new rulemaking, not a revision of any prior proposal. As such, it simply does not fall within your agency "housekeeping authority" and is not only unauthorized but is invalid at least to that extent and for that reason. Moreover, your proposed new rulemaking is simply not authorized or valid under the requirements of the Administrative Procedure Act.

In short, your proposed new definition of "publicly available" is simply unauthorized as a part of the housekeeping authority you invoke in your subject Notice of Proposed Supplementary Rulemaking.

When treated as newly proposed rulemaking, your proposal is of course subject to the requirements of the Administrative Procedure Act. It does not meet them. It must be withdrawn or rejected for that reason alone.

2. *Your proposed definition is ambiguous and unworkable as it stands without any attempt at a contrasting definition or definitions of "nonpublicly available" such as in Section 313.3 that you invoke.*

Substantively, your Proposed Notice offers a definition of "publicly available" that you write is "similar" to the definition of "publicly available" at 16 C.F.R. § 313.3. Your stated reason for your claim to Section 313.3 as the basis for your new proposed definition is that "the meaning of information that is available to the general public should not vary." Yet Section 313.3 was carefully crafted to include a contrasting definition of "nonpublic personal information" which your new proposed definition does not. It should. Not simply to mirror the Section 313.3 you say you are using as your framework or model, but because the contrasting definition gives clarity and meaning to the definition of "publicly available" in your proposed new definition.

Your proposed new definition of "publicly available" should include a contrasting definition similar to the definition of "nonpublic personal information" found in 16 C.F.R. § 313.3(n). If your proposed new definition does not include this or a similar contrasting definition, as it now stands it would be hopelessly inadequate and should be rejected for that reason, even if it were to be considered in the first place as your proposal to make a new rule.

For your ease of reference, here is the complete definition found in Section 313.3(n).

16 C.F.R. §313.3(n):

(1) *Nonpublic personal information* means:

- (i) Personally identifiable financial information; and
- (ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available.

(2) *Nonpublic personal information* does not include:

- (i) Publicly available information, except as included on a list described in [paragraph \(n\)\(1\)\(ii\)](#) of this section; or

(ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any personally identifiable financial information that is not publicly available.

(3) Examples of lists - (i) [Nonpublic personal information](#) includes any list of individuals' names and street addresses that is derived in whole or in part using personally identifiable financial information (that is not publicly available), such as account numbers.

(ii) [Nonpublic personal information](#) does not include any list of individuals' names and addresses that contains only publicly available information, is not derived, in whole or in part, using personally identifiable financial information that is not publicly available, and is not disclosed in a manner that indicates that any of the individuals on the list is a consumer of a [financial institution](#).

2. *16 C.F.R. § 313.3(p) provides the working definition of "publicly available" which your proposed new definition simply does not provide.*

Further, your proposed new definition of "publicly available" is not "similar" to the definition of "publicly available information" at 16 C.F.R. § 313.3(p), despite your statement to the contrary in your Proposed Notice. Your proposed new definition varies "the meaning of information that is available to the general public" contrary to your announced intention, which is quite correct, that the meaning in the Code of Federal Regulations "should not vary."

If it were to be considered at all as a new proposed rule, your new proposed definition of "publicly available" ought to simply and expressly incorporate Section 313.3(p) by reference. Without that, your proposed new definition is ambiguous, misleading, and unauthorized. It should be rejected for all those reasons.

For ease of reference, here is the complete text of Section 313.3(p).

16 C.F.R. § 313.3(p):

(p)

(1) Publicly available information means any information that **you** have a **reasonable basis** to believe is lawfully made available to the general public from:

- (i) Federal, State, or local **government records**;
- (ii) **Widely distributed media**; or
- (iii) Disclosures to the general public that are required to be made by Federal, State, or local law.

(2) Reasonable basis. **You** have a **reasonable basis** to believe that information is lawfully made available to the general public if **you** have taken steps to determine:

- (i) That the information is of the type that is available to the general public; and
- (ii) Whether an individual can direct that the information not be made available to the general public and, if so, that **your** consumer has not done so.

(3) Examples -

(i) **Government records.** Publicly available information in **government records** includes information in government real estate records and security interest filings.

(ii) **Widely distributed media.** Publicly available information from **widely distributed media** includes information from a telephone book, a television or radio program, a newspaper, or a web site that is available to the general public on an unrestricted basis. A web site is not restricted merely because an Internet service provider or a site operator requires a fee or a password, so long as access is available to the general public.

(iii) **Reasonable basis - (A)** **You** have a **reasonable basis** to believe that mortgage information is lawfully made available to the general public if **you** have determined that the information is of the type included on the public record in the jurisdiction where the mortgage would be recorded.

(B) **You** have a **reasonable basis** to believe that an individual's telephone number is lawfully made available to the general public if **you** have located the telephone number in the telephone book or the consumer has informed **you** that the telephone number is not unlisted.

Conclusion

Thank you for your consideration of these Comments. Whether these Comments are taken separately or together, your proposed new definition of "publicly available" is simply unauthorized as a part of the housekeeping authority you invoke in your subject Notice of Proposed Supplementary Rulemaking.

When treated as newly proposed rulemaking, your proposal is of course subject to the requirements of the Administrative Procedure Act. It does not meet them. It must be withdrawn or rejected for that reason alone.

On the substance of your proposed new text, your proposed definition is ambiguous and misleading. To truly be similar to the definitions at 16 C.F.R. § 313.3, you must incorporate contrasting definitions to clarify your meaning and make your proposed new definition workable. Without a contrasting definition or definitions as are found in Section 313.3, your proposed new definition is devoid of meaning.

Finally, your proposed new rule defining "publicly available" would serve no purpose which your agency is authorized to serve. There is already a perfectly workable definition of "publicly available" found in Section 313.3(p). Your failure to expressly incorporate it into your own proposal points up the failure of your own proposed definition even considering it on the substance of the thing.

To say again, whether these Comments are taken separately or together, your proposed new definition of "publicly available" in your Notice of Proposed Supplementary Rulemaking is unauthorized and invalid. It should be withdrawn or rejected.

Sincerely,

Dennis Wall