



**Legal Opinion L-2005-15**  
**May 24, 2005**

U.S. Railroad Retirement Board  
844 North Rush Street  
Chicago Illinois, 60611-2092

Phone: (312) 751-7139  
TTY: (312) 751-4701  
Web: <http://www.rrb.gov>

**TO** : Catherine A. Leyser  
Director of Assessment and Training

**FROM** : Steven A. Bartholow  
General Counsel

**SUBJECT** : Improper Payments Report

This memorandum is in response to your request for a legal opinion to address the issue of whether the Office of Programs has complied with applicable legal requirements governing the improper payments submission for the agency's Performance and Accountability Report (P&AR).

The Improper Payments Information Act of 2002 (Public Law 107-300) requires that the agency:

. . . in accordance with guidance prescribed by the Director of the Office of Management and Budget" (OMB), annually review all programs and activities that it administers and identify all such programs and activities that may be susceptible to significant improper payments. (P.L. 107-300, Sec. 2(a))

Section 2(b) of the law then requires that with respect to all programs identified as being susceptible to significant improper payments, the agency shall estimate the annual amount of improper payments and submit those estimates to Congress before March 31 of the following applicable year. Section 2(c) provides that if the estimated improper payments in a program exceed \$10 million, the agency shall include with the estimate provided to Congress a report on what actions the agency is taking to reduce the improper payments.<sup>1</sup>

Section 2(d)(1) of P.L. 107-300 defines the term "agency" to mean an executive agency, as that term is defined in section 102 of Title 31 of the United States Code. Section 102 of Title 31 defines "executive agency" to mean "a department, agency, or instrumentality in the executive branch of the United States Government." The Board falls within this definition of "agency."

Section 2(d)(2) of the Improper Payments Information Act defines the term "improper payment" to include any payment that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative, or other legally applicable requirements.

As required by P.L. 107-300, the Office of Management and Budget (OMB) issued guidance that outlines how Federal agencies should implement the Improper Payments Information Act in Memorandum M-03-13, dated May 21, 2003. The Introduction section of M-03-13 notes that agencies with programs listed in Section 57 of the OMB Circular A-11 were already required to report annually on the extent of the erroneous payments in those programs and the actions they were taking to reduce erroneous payments.<sup>2</sup> That Introduction states that P.L. 107-300 has extended the erroneous payment reporting requirements to programs and activities beyond those listed in Circular A-11, and ends with a statement that, "This

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<sup>1</sup> This report must include (1) a discussion of the causes of the improper payments identified, actions taken to correct those causes, and results of the actions taken; (2) a statement of whether the agency has the information systems and other infrastructure it needs in order to reduce improper payments to minimal cost-effective levels; (3) if the agency does not have such systems and infrastructure, a description of the resources the agency has requested in its budget submission to obtain the necessary information systems and infrastructure; and (4) a description of the steps the agency has taken to ensure that agency managers (including the agency head) are held accountable for reducing improper payments.

<sup>2</sup> Both the railroad retirement and survivor benefits program and the railroad unemployment insurance benefit program administered by the Railroad Retirement Board were listed in Section 57.



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guidance implements the requirements of the Act (i.e., P.L. 107-300) and supercedes Section 57 of Circular A-11.”

The OMB guidance enumerates the reporting requirements of the Improper Payments Information Act, with the first step being to review all programs and activities and identify those which are susceptible to significant erroneous payments. Step 2 is to determine a statistically valid estimate of the annual amount of erroneous payments in programs and activities. Step 3 is to implement a plan to reduce erroneous payments, and step 4 is to report estimates of the annual amount of erroneous payments in programs and activities and progress in reducing them.

Step 1 of the OMB guidance includes a statement that “For the purposes of this guidance, significant erroneous payments are defined as annual erroneous payments in the program exceeding both 2.5% of program payments and \$10 million.” To clarify step 1, the guidance provides examples that explain that only if an agency has an error rate in a program that exceeds **both** 2.5% of the program payments and \$10 million does the agency need to perform step 2 (and subsequently steps 3 and 4) of the guidance. In other words, if an agency identifies a program that is susceptible to significant erroneous payments, but then finds that the error rate does not exceed both \$10 million and 2.5% of the program, the agency needs only to identify the program and report the estimate of erroneous payments without taking the additional enumerated steps.

In a memorandum dated July 22, 2004, the Controller of OMB included a format to be used to report the estimated amount of improper payments, and references OMB Memorandum M-03-13 as the guidance for complying with the reporting requirements of the Improper Payments Information Act of 2002. Your numbered questions are set out below followed by a response.

1. You ask first whether your interpretation of OMB Guidance M-03-13 is correct. You explained that because application of that guidance indicates that the Board does not have significant improper payments, you have concluded that you do not have to do steps 2 through 4,

It is my opinion that you have interpreted OMB Guidance in M-03-13 correctly. Step 1 of the OMB Guidance plainly states that improper payments are significant if they exceed both \$10 million and 2.5% of the program being evaluated. Examples included in M-03-13 to illustrate the application of Step 1 indicate that if the improper payments do not exceed both of these thresholds, the agency need not go beyond step 1 of the Guidance in M-03-13. However, section 2 (c) of the Improper Payments Information Act provides that:

With respect to any program or activity of an agency with estimated improper payments under subsection (b) that exceed \$10,000,000, the head of the agency shall provide with the estimate under subsection (b) a report on what actions the agency is taking to reduce the improper payments . . .

Thus, the Act would require an agency to go beyond merely reporting the amount of improper payments if the amount of those improper payments exceeds \$10 million, whereas the OMB Guidance states that an agency needs to take the additional enumerated steps only if the improper payments exceed both \$10 million and 2.5% of the program being evaluated.<sup>3</sup> We have not

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<sup>3</sup> In fact, example 1 in Step 1 is one in which the error rate in a program is 2.25% or \$14 million. The example states that:

<sup>3</sup> (CON'T)

“Under this guidance, an agency need not perform step 2, making a statistically valid estimate of erroneous payments in the program, because the potential error rate does not exceed 2.5%. In addition, the agency need not report an error rate for the program in its annual Performance and Accountability Report.”



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located any explanation, either in the legislative history of P.L. 107-300 or in subsequent OMB memoranda discussing the reporting requirements of the Act<sup>4</sup> to explain the reason for the different standards. OMB is delegated authority by P.L. 107-300 to issue guidance to agencies and that guidance very clearly states that improper payments are significant only if they exceed both \$10 million and 2.5% of the program being evaluated. You are clearly complying with the guidance issued by the agency with authority to interpret P.L. 107-300. Notwithstanding my opinion that you are complying with OMB's guidance, I have no objection to your seeking clarification from OMB in this regard as suggested by the RRB Office of Inspector General.

Your second question asks if the OMB document entitled "Improving the Accuracy and Integrity of Federal Payments," dated January 25, 2005, takes precedence over the guidance in M-03-13. You also ask if the agency should be completing steps 2 through 4 of the guidance in M-03-13 for the Railroad Retirement Act program because even though the 2.5% threshold is not met, the estimate of improper payments under the RRA exceeds \$10 million.

The OMB document issued January 25, 2005 is a report that aggregates the results of agency reports of improper payments, highlights significant findings, agency accomplishments, and remaining challenges relating to the elimination of improper payments. The January 2005 document is not itself guidance that the Board must follow in preparing its report of improper payments, but is in essence a summary of the reports that have been made.

With respect to the second part of your second question, the guidance in M-03-13 would indicate that you do not need to complete steps 2 through 4 for the railroad retirement program, since the improper payments do not exceed 2.5% of the program. However, as noted in the response to your first question, section 2(c) of the Improper Payments Information Act would impose the additional reporting requirements on a program in which erroneous payments exceed \$10 million. If you were to seek clarification from OMB as suggested above, a more definitive answer to this question may be obtained.

Your third question is whether you should be completing steps 2 through 4 of the guidance in M-03-13 for the RUIA program because it is listed in Section 57 of OMB Circular A-11. You noted that your estimate of improper payments for the RUIA program is less than \$10 million and less than 2.5%. Because the estimate of improper payments in the RUIA program does not exceed the threshold amounts, it is my opinion that you do not need to complete steps 2 through 4 for that program. As noted earlier in this memorandum, the guidance in M-03-13 includes a statement that it supercedes the provisions of section 57 of OMB Circular A-11. The fact that the RUIA program was listed in section 57 simply means that it is a program that is subject to significant improper payments and that therefore a report of the amount of improper payments must be made for each year. However, the reporting thresholds must still be applied in order to determine whether there were in fact significant improper payments in a program and whether any action must be taken beyond Step 1.

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<sup>4</sup> The reporting requirements of the Improper Payments Information Act are discussed in an OMB memorandum dated July 22, 2004 from Controller Linda M. Springer and in a document entitled, "Improving the Accuracy and Integrity of Federal Payments," issued January 25, 2005. Nor did section 57 of OMB Circular No. A-11 discuss a measurement using 2.5% of the program being evaluated.