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MEMORANDUM

TO: Jim J. Tozzi

FROM: William G. Kelly, Jr.

DATE: May 27, 2010

SUBJECT: *Prime Time Int'l Co. v. Vilsack* and judicial review of agency action under the Information Quality Act ("IQA") and its guidelines

This memorandum is in response to requests for a detailed explanation and discussion of the recent *Prime Time* decision in the D.C. Circuit and its implications for the issue of judicial review of agency actions under the IQA and its guidelines. The *Prime Time* opinion has now been published. 599 F.3d 678 (D.C. Cir. 2010). There have also been subsequent developments in the case, which are discussed in section II, below.

I. The D.C. Circuit's IQA holding in *Prime Time*

Plaintiff Prime Time Int'l sought disclosure and correction under the IQA of the data that the USDA used to calculate monetary assessments it levied on Prime Time under the Fair and Equitable Tobacco Reform Act ("FETRA"). FETRA repealed a system of quotas and price supports for tobacco producers and provided for assessments on tobacco product manufacturers and importers to ease the transition. USDA did not respond to Prime Time's IQA petition for correction or a subsequent appeal.

The D.C. Circuit held, in Part III of its opinion, that USDA's calculation of Prime Time's annual assessment was an "adjudication," and therefore exempt from IQA coverage because the OMB IQA guidelines specifically exempted adjudications. Although the Court avoided ruling on whether the IQA conferred a right to correction, it held instead that "because Congress delegated to OMB authority to develop binding guidelines implementing the IQA, we defer to OMB's reasonable construction of the statute [exempting adjudications]." For this holding, the Court cited *United States v. Mead*, 533 U.S. 218, 226-27(2001). 599 F.3d at 685. The Court also stated: "The IQA is silent on the meaning of 'dissemination,' and in defining the term OMB exercised its discretion to exclude documents prepared and distributed in the context of adjudicative proceedings. This is a permissible interpretation of the statute, see *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778, and Prime Time does not contend otherwise." *Id.* at 685-86. The Court also commented that this IQA issue was "straightforward" and that its "proper resolution ... is beyond any doubt." *Id.* at 686.

Thus, although the Court declined to rule on whether the IQA statute provided Prime Time with a right to disclosure or correction, it disposed of the issue on the basis that OMB's IQA guidelines were "binding" because they contained a permissible interpretation of the IQA under *Chevron*. In doing so, the Court clearly held that the OMB interpretation was entitled to *Chevron*-level deference (as opposed to a lower level of deference under *Skidmore*), because the OMB guidelines have the "force of law," having been promulgated under a specific

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Congressional delegation in the IQA. In other words, the Court held that the OMB guidelines are legally binding, not just internally binding as might be the case with many Executive orders and agency manuals or handbooks.

Although the above reading of the *Prime Time* opinion might not seem clear to some who are not familiar with the *Chevron-Mead* line of Supreme Court opinions, the Court's citation to specific pages of *Mead*, as well as its reference to *Chevron* and OMB's interpretation as "permissible," clarifies the matter. The portion of *Mead* that was cited by the Court (at 226-227), which is the only statement in *Mead* that overlaps those two pages, states:

We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. [Emphasis added]

533 U.S. 218, 226-27 (2001). This principle is repeated throughout *Mead*. The *Mead* opinion makes clear that when an agency issues a rule that is entitled to *Chevron*-level deference, "any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." 533 U.S. at 227 (footnote omitted, emphasis added). *Mead* contrasted rules that are legally binding and therefore entitled to *Chevron*-level deference with "rulings [that] are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines' [that] ... are beyond the *Chevron* pale." *Id.* at 234.

In *Mead*, the Supreme Court determined that when an agency interpretation is not legally binding, it might nevertheless deserve *Skidmore*-level deference, with the degree of that deference depending on the reasonableness and "power to persuade" of the agency interpretation rather than its binding force. *Id.* at 235.

Therefore, the decision by the D.C. Circuit in *Prime Time* to grant the IQA guidelines *Chevron*-level deference held that the IQA guidelines have "the force of law" and are binding on the courts unless they are "arbitrary and capricious in substance, or manifestly contrary to the statute."

II. The District Court decision in *Prime Time*, the Parties' Arguments, and the Government's Petition for Rehearing

In the District Court phase of *Prime Time*,¹ the Government argued that the IQA and its guidelines do not create any legally enforceable right, and that the IQA commits agency action to its discretion because there is no meaningful "law to apply." For the first proposition, the Government relied almost exclusively (and repeatedly) on the very brief, and unexplained,

¹ The District Court case was styled *Single Stick, Inc. v. Johanns*, 601 F.Supp. 2d 307 (D.D.C. 2009). Single Stick, Inc. changed its name to Prime Time International Co. before the appeal.

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statements in the Fourth Circuit's opinion in *Salt Institute v. Leavitt*,² and for the second proposition it relied on several broadly-worded statements from the preamble to OMB's 2002 final government-wide guidelines and U.S. District Court decisions in *Salt Institute*³ and the *Upper Missouri River* case.⁴

Plaintiff Single Stick relied on the plain language of the IQA which states that interested persons can "seek and obtain" correction of information, and it pointed out that there was absolutely no analysis of the IQA issue in the Fourth Circuit's *Salt Institute* opinion in support of the statement the Government relied on, and that established APA case law clearly provided for "law to apply" under the very detailed provisions of the IQA guidelines.

The District Court in *Single Stick* simply relied on the Fourth Circuit's single-sentence statements in *Salt Institute* to hold that there is no indication in the IQA that persons have a right to seek and correct information. The District Court did not quote the language of the IQA or its Guidelines on this point. The District Court also held that there was no final agency action to review because -- again relying on *Salt Institute* -- the IQA does not vest a right to correction of information. On this point, the District Court also cited the decision of the District Court for the Northern District of California in *Americans for Safe Access v. HHS*,⁵ without noting that there was an appeal pending in that case.

On appeal, Single Stick (now with the new name of Prime Time Int'l) argued that the plain language of the IQA -- "seek and obtain" -- created a right, and that there was a complete lack of analysis in the *Salt Institute* Circuit Court opinion, or even any examination of the language of the statute,⁶ and that settled APA case law provides that "law to apply," can be based on very little in the way of guidance. The Government again repeatedly relied on *Salt Institute* as authority for the IQA not creating any rights, but it also argued for the first time that the USDA assessment action was an "adjudication," and therefore specifically exempt from the IQA under the OMB IQA Guidelines, although it did not argue that the OMB Guidelines were entitled to *Chevron*-level deference (or even *Skidmore*-level deference) and that therefore they had the "force of law" and were "binding." In its reply, Prime Time argued that the alleged holding in

² 440 F.3d 156 (4th Cir. 2006). The Fourth Circuit stated that "[t]he IQA ... does not create any legal right to information or its correctness." At 159. The Court made a similar brief statement in two other places on the same page.

³ 345 F.Supp.2d 589 (E.D.Va. 2004).

⁴ *In re Operation of the Missouri River Sys. Litig.*, 363 F.Supp.2d 1145 (D.Minn. 2004), *vacated in part and aff'd in part on other grounds*, 421 F.3d 618 (8th Cir. 2005).

⁵ *Americans for Safe Access v. HHS*, Civ. No. 07-1049, WL 214289 (N.D.Cal. 2007) (not reported).

⁶ Prime Time Int'l also questioned whether the IQA issue had even been put squarely before the court. Indeed, in oral argument before the Fourth Circuit, the Government argued emphatically that the case did not raise an IQA judicial review issue. Also, the Fourth Circuit's opinion referred to the petition that was at issue as "purported" to have been filed under the IQA, and stated that "[b]ecause appellants' lone request was that information be made public, NHLBI construed their petition for correction as a request for information under the Freedom of Information Act (FOIA) and denied it." At 157.

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Salt Institute and the Government's position were contrary to the APA and a large and established body of APA case law. It also noted that the *Americans for Safe Access* ("ASA") case in the Ninth Circuit cited by the District Court was on appeal. Prime Time also argued that the Government had waived the "adjudication exemption" issue by not raising it in District Court.

As discussed above, the D.C. Circuit accepted the Government's "adjudication exemption" argument based on the Supreme Court doctrine of bestowing *Chevron*-level deference on rules that have the force of law, and it did not address any of the IQA arguments made by either side in the District Court, or the District Court's position on the IQA.

The Government was clearly concerned with the D.C. Circuit's position on the IQA Guidelines and its implications for the pending appeal in the ASA case in the Ninth Circuit,⁷ and it filed a petition for rehearing, even though it had won the case. The Government's petition asked the Circuit Court to clarify that it had not ruled that the IQA created judicially enforceable rights, particularly in view of an article by the Center for Regulatory Effectiveness, which it attached as an exhibit to the petition (Exhibit B), headlined "D.C. Circuit Beats 9th Circuit to the Punch: The Data (Information) Quality Act is Subject to Judicial Review." Prime Time did not file an opposition. The D.C. Circuit denied the Government's petition without an opinion on May 10, 2010. A copy of the petition for rehearing (minus the Circuit opinion as an exhibit) is attached, as well as the Court's per curiam order denying the petition.

III. Significance of the *Prime Time* decision for IQA judicial review and the pending appeal of *Americans for Safe Access* ("ASA") in the Ninth Circuit.

The Government is clearly worried that the *Prime Time* decision could impact the pending ASA appeal, as well it should be. The D.C. Circuit is often considered to be the most influential Circuit on APA issues (certainly more so than the Fourth Circuit), and the Government has little more than one short, unexplained statement -- which some consider dicta -- from the *Salt Institute* opinion in the Fourth Circuit on which to rely.

Although the D.C. Circuit did not explicitly hold that agency action on IQA petition is judicially reviewable under the APA, it went a long way in that direction. One of the Government's primary arguments in the ASA case is that the IQA and its guidelines do not create any legally-enforceable rights. Even a casual reading of the OMB IQA guidelines shows that OMB has interpreted⁸ the IQA as obligating the agencies to follow certain standards and to

⁷ The ASA appeal is still pending as of the date of this memorandum. Oral argument in the ASA case was held on April 14, 2009, so the appeal has been pending for an unusually long time. (The D.C. Circuit's opinion in *Prime Time* was issued a little more than three months after oral argument.)

⁸ Even absent the OMB Guidelines, the IQA itself appears to contain rights-creating language in requiring agencies to establish mechanism allowing affected persons to "seek and obtain" correction of information. Of course, in order to seek judicial review, a petitioner would have to establish "standing" to bring the case under Article III of the Constitution, and this requirement would likely greatly restrict the number of cases that could be maintained.

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respond substantively to non-frivolous petitions for correction in a timely manner.⁹ The guidelines (as well as the statute itself) also clearly provide ample "law to apply" under established APA case law. If the Ninth Circuit were to accept the D.C. Circuit's position that the OMB guidelines carry the force of law and are entitled to *Chevron*-level deference, it would undercut the Government's reliance on the *Salt Institute* opinion and leave it with little more than the argument that the APA does not apply because another statute provides an adequate alternative remedy. It will be difficult for the Government to prevail on that argument because there are no alternative proceedings currently under way, and the OMB guidelines, as well as the agency guidelines, require agencies to respond to petitions and petition appeals within definite timeframes.

Even if the Ninth Circuit were to somehow rule against ASA and deny judicial review, it would have a difficult time drafting an opinion that did not arguably create a Circuit split with the D.C. Circuit (and possibly the Fourth Circuit), thereby setting the stage for possible Supreme Court review.

On the other hand, if the Ninth Circuit writes a detailed and thoughtful opinion in favor of APA judicial review of agency action on IQA petitions, it would arguably create a split with the Fourth Circuit (although it could be argued that the Fourth Circuit's pronouncement on the IQA was dicta or deserves little regard because of its complete lack of analysis), thereby also possibly setting the stage for Supreme Court review. But even absent Supreme Court review, decisions favorable to IQA judicial review in both the D.C. Circuit and the Ninth Circuit would certainly largely negate the Fourth Circuit's opinion and provide the basis for new IQA APA judicial review cases in both those Circuits.

It should be kept in mind also that there is more at stake than just the original OMB government-wide guidelines and the conforming agency guidelines. The OMB peer review guidelines¹⁰ were also expressly promulgated pursuant to the IQA, and failure to comply with those guidelines could be considered agency action "without observance of procedure required by law." (5 U.S.C. § 706(2)(d).)¹¹

The impacts of *Prime Time* could also possibly extend to the joint OMB-OSTP "Updated Principles for Risk Assessment" because the Principles Memorandum states that it is intended to

⁹ Although not noted in the OMB Guidelines, the Paperwork Reduction Act, which is supplemented and incorporated by reference into the IQA, expressly requires agencies to follow information policies established by OMB. 44 U.S.C. § 3506(a)(1)(B).

¹⁰ 70 Fed. Reg. 2664 (Jan. 14, 2005).

¹¹ Although the Peer Review guidelines (titled a "Bulletin") state at the end that they are not subject to judicial review, such legal determinations are outside an agency's authority and are questions of law for the courts, as OMB reminded the other agencies when they were developing their original guidelines to conform to the OMB Guidelines. See the Memorandum for President's Management Council from OIRA, dated June 10, 2002, at p. 15 ("[A]gencies should be aware that their statements regarding judicial enforceability might not be controlling in the event of litigation.")
http://www.whitehouse.gov/omb/assets/omb/inforeg/iqg_comments.pdf.

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"complement and support" the general IQA Guidelines.¹² Thus, the Updated Principles would be considered an interpretation of those portions of the original OMB government-wide IQA Guidelines that are pertinent to risk assessment, particularly the requirement for "objectivity" contained in the IQA and the OMB government-wide guidelines, as the Principles Memorandum expressly notes. As is well established, the courts give almost absolute deference to an agency's interpretation of its own rules.¹³

Attachment (Government petition for rehearing with the CRE article as Exhibit B)

¹² Memorandum to the Heads of Executive Departments and Agencies from OMB and OSTP, dated Sept. 19, 2007, at p. 2 fn. 8. See also p. 6 and other numerous references to the IQA Guidelines. <http://www.whitehouse.gov/omb/assets/omb/memoranda/fy2007/m07-24.pdf>.

¹³ See, e.g., *Tozzi v. HHS*, 271 F.3d 301, 311 (D.C. Cir. 2001).

[ORAL ARGUMENT HEARD JANUARY 11, 2010]

No. 09-5099

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRIME TIME INTERNATIONAL COMPANY,
FORMERLY KNOWN AS SINGLE STICK, INC.,
Plaintiff-Appellant,

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE;
UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLEES' PETITION FOR PANEL REHEARING

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For the following reasons, the Government respectfully requests that the panel amend its opinion to clarify that the Court did not decide whether the Information Quality Act (“IQA”) creates judicially enforceable rights.

1. Among other claims, plaintiff asserted claims under the Information Quality Act, 44 U.S.C. § 3516 note. *See* Panel Op. 2 (attached as Exhibit A). The Government opposed these claims on two alternative grounds. The first, and narrower, ground was that the IQA does not apply to information distributed in the context of adjudicative processes. *See* Gov. Br. 26-28. The second ground — accepted by the district court — was that even when information has been “disseminated” and is thus covered by the statute, the IQA does not create any judicially enforceable rights. *Id.* at 29-33. Relying in part on the Fourth Circuit’s decision in *Salt Institute v. Leavitt*, 440 F.3d 156 (4th Cir. 2006), the Government explained that the IQA simply “orders the Office of Management and Budget to draft guidelines concerning information quality and specifies what those guidelines should contain.” Gov. Br. 29 (quoting *Salt*, 440 F.3d at 159).

2. This Court accepted the Government's first argument and held that the information at issue here is not covered by the IQA. *See* Panel Op. 12-16. Accordingly, this Court did not reach the broader ground accepted by the district court and by the Fourth Circuit in *Salt*. That broader issue is presented in a case now pending before the Ninth Circuit. *See Americans for Safe Access v. HHS*, No. C 07-01049, 2007 WL 4168511, at *4 (N.D. Cal. Nov. 20, 2007) ("This order agrees that the IQA and OMB guidelines do not create a duty to perform legally required actions that are judicially reviewable."), *appeal pending*, No. 07-17388 (9th Cir.).

3. Although this Court's opinion did not address the Government's broader argument or the *Salt* decision, the Center for Regulatory Effectiveness ("CRE") has urged that this Court implicitly rejected the Government's position on its second argument. The CRE website declares: "D.C. Circuit Beats 9th Circuit to the Punch: The Data (Information) Quality Act is Subject to Judicial Review" and argues that this holding is implicit in this Court's decision. The CRE article is attached as Exhibit B to this petition and is available at

<http://www.thecre.com/>.

4. In our view, it is clear that this Court did not reach the broader issue of IQA enforcement or create an implicit conflict with *Salt*.

Nonetheless, in an abundance of caution, we respectfully request that the Court amend its opinion to clarify that it did not reach the question whether the IQA creates judicially enforceable rights.

Respectfully submitted.

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APRIL 2010

CERTIFICATE AS TO PARTIES

Pursuant to D.C. Circuit Rules 28(a)(1)(A) and 35(c), appellees respectfully submit this Certificate As To Parties. The following list represents all parties, intervenors, and amici appearing before the district court and this Court:

Prime Time International Company, formerly known as Single
Stick, Inc., plaintiff-appellant
Thomas J. Vilsack, Secretary of Agriculture, defendant-appellee
United States Department of Agriculture, defendant-appellee


s/ Sydney Foster
Sydney Foster

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2010, I filed and served the foregoing petition for panel rehearing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that on or before May 3, 2010, I will cause four copies to be delivered to the Court via hand delivery. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

s/ Sydney Foster
Sydney Foster

EXHIBIT B



The Center for Regulatory Effectiveness

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Reg History



D.C. Circuit Beats 9th Circuit to the Punch: The Data (Information) Quality Act is Subject to Judicial Review

In an opinion issued March 26, 2010, in *Prime Time Int'l Co. v. Vilsack*, the D.C. Circuit stated that the OMB guidelines issued under the IQA are "binding." The court stated: "[B]ecause Congress delegated to OMB authority to develop binding guidelines implementing the IQA, we defer to OMB's construction of the statute. See *United States v. Mead*, 533 U.S., 218, 226-27 (2001)." At 14. The opinion is not yet published, and a pdf copy is attached below.

The citation of *Mead* at those particular pages is significant. The only statement by the Supreme Court in *Mead* that overlaps those two pages is the following: "We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." (Emphasis added)

Therefore if you connect the dots, the fact that the Court opined that OMB's regulations are legally binding with the Court's link of this finding to *Mead*, you readily conclude that the DQA (IQA) is judicially reviewable.

Prime Time had filed an IQA petition with USDA, but USDA failed to respond, and Prime Time filed an APA claim for judicial review. The District Court dismissed the claim on the basis that the IQA did not create any legal right to a correction, relying on the 2006 opinion by the 4th Circuit in the *Salt Institute*

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case and the District Court opinion in *Americans for Safe Access v. HHS* ("ASA"). The ASA case is currently on appeal in the 9th Circuit, with oral argument having taken place a year ago.

In *Prime Time*, the D.C. Circuit ignored the District Court opinion's reasoning and embraced a new Government argument that the substantive USDA action at issue was an "adjudication," and therefore specifically exempt from the IQA under the OMB guidelines.

The issue of whether the IQA guidelines and the IQA itself create legal rights that make agency actions subject to judicial review is at issue in the ASA case.

The D.C. Circuit's opinion is definitive and puts to rest the 4th Circuit's unexplained IQA decision in the *Salt Institute* case and will presumably have to be taken into account by the 9th Circuit.

It should be noted that the DC Circuit Court decision will not result in an avalanche of litigation for a number of reasons. The plaintiff must demonstrate standing which includes a demonstration of injury and redressability..

With respect to standing, claiming the contents of one report, when there might be many others in existence which address the same topics, is a cause of injury will constitute a challenge. With respect to redressability the plaintiff will have to identify an action the court can take to address its injury resulting from a report subsequent to its publication-both of these tasks presents a significant challenge.

However, given that *Tozzi v HHS* expands the potential plaintiff base to include harm caused indirectly by third-parties, the potential for a wide range of injury claims will be considered by the courts. Nonetheless the standing arguments presented above will place a damper on legal actions unless the underlying DQA petitions comply with the letter of the law.

CRE believes that the Federal agencies have done an exemplary job in publishing their DQA guidelines and responding to the resultant requests for corrections. The *Prime Time* decision is definitive-in those few instances when federal agencies do not give an objective consideration to a well reasoned request for correction, the courts will.

- Click [here](#) to read court opinion

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CBO POLICY STATEMENTS

CBO Releases Estimate For Restoring American Financial Stability Act 2010

The Congressional Budget Office is releasing a cost estimate for S. 3217, the Restoring American Financial Stability Act of 2010, as ordered reported by the Senate Committee on Banking, Housing, and Urban Affairs on March 22, 2010. S. 3217 would grant new federal regulatory powers and reassign existing regulatory authority among federal agencies with the aim of reducing the likelihood and severity of financial crises. The legislation would establish a program to facilitate the resolution of large financial institutions that become insolvent or are in danger of becoming insolvent when their failure is determined to threaten the stability of the nation's financial system (such institutions are known as systemically important firms).

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