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Via E-mail and Fax

Hon. John D. Graham
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
Executive Office of the President
Washington, DC 20503

Dear Administrator Graham:

OMB's draft report to Congress on the costs and benefits of federal regulation contains a section on legal developments on the issue of judicial reviewability of final agency actions taken pursuant to the Information Quality Act and the OMB guidelines, but OMB has again avoided stating its position on that issue. It is clear that in the litigation described in the draft report the Department of Justice has been defending final actions by certain federal departments and agencies other than OMB by arguing that judicial review is not available.

Congress has charged OMB, not the other individual departments and agencies, with primary authority for implementing the Act, and OMB should advise Justice that OMB's position is that such final agency actions are judicially reviewable pursuant to the Administrative Procedure Act. This view should be stated in both the final OMB report to Congress and the OMB government-wide information quality guidelines.

The Department of Justice position on this matter appears to be a carryover from the Clinton Administration, which initially opposed the legislation and then acquiesced in it only grudgingly. However, the position being maintained by Justice is blatantly contrary to the plain language of the APA and established legal precedent and should be withdrawn. Not only is the position obviously legally incorrect, but it is also poor public policy. A government position that its citizens who are actually harmed by incorrect information disseminated by its agencies, and who meet the Constitutional requirements for standing, do not have a legal remedy if the agency fails to correct the information is antithetical to principles of a democratic society and good government.

The APA plainly provides for judicial review of a person harmed by an agency's incorrect dissemination of information once the agency finally denies relief. The APA provides a right of review to any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The term "agency action" is defined with great breadth in the

APA (5. U.S.C. § 551(13)), and the U.S. Supreme Court has stated that the definition "is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 478 (2001); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 238, n.7 (1980) (The term "agency action" was intended by Congress "'to assure the complete coverage of every form of agency power, proceeding, action, or inaction.'").

The Justice argument that there is no judicial review because it is not provided for in the information quality legislation is completely without merit. The APA provides that agency actions are reviewable both if they are "made reviewable by statute" or if "there is no other adequate remedy in a court". 5 U.S.C. § 704. The U.S. Supreme Court has held that under this provision of the APA "[a] separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intent to preclude review." *Japan Whaling Ass'n v. Amer. Cetacean Soc'y*, 478 U.S. 221, 230, n. 4 (1986); *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984); *Abbot Laboratories v. Gardner*, 367 U.S. 136, 140-41 (1967); *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 687-88 (9th Cir. 2003). The APA specifically provides that its judicial review provisions apply "except to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

The Department of Justice has argued that because the OMB guidelines provide some discretion to agencies on how exactly to respond to requests for correction, their action on a petition for correction is "committed to agency discretion by law." In making this argument, Justice must not only assume that the OMB guidelines are "law" (and therefore binding); but, in addition, it is incorrect in arguing that an indication of some discretion in a law immunizes an agency against judicial review. There are numerous provisions in the OMB guidance that are stated in binding terms, and there is abundant case law that there is a very strong presumption against exempting an agency action from review under this provision. If there is some meaningful standard to apply, whether in a statutory provision, a rule, or agency practice – as there clearly is in the case of the OMB information quality standards – the agency action will not be considered committed to its discretion even if the agency has substantial discretion. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Spencer Enterprises, supra*, at 688; *Dickson v. United States*, 68 F.3d 1396, 1401 (D.C. Cir. 1995).

OMB should assert its primary responsibility over implementation and interpretation of the information quality legislation and its guidelines and rein in the Department of Justice. The Justice arguments are not valid and are contrary to the sound policy of holding agencies accountable for actions that improperly harm American citizens.

Respectfully,

Jim J. Tozzi
Member, CRE Advisory Board