

Multinational Legal Services, PLLC

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 FETRA repealed a system of quotas and price supports for tobacco producers and provided for assessments on tobacco product manufacturers and importers to ease the transition.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

Multinational Legal Services, PLLC

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.

Multinational Legal Services, PLLC

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.

Multinational Legal Services, PLLC

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.

Multinational Legal Services, PLLC

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.

Multinational Legal Services, PLLC

"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

TONY WEST
Assistant Attorney General

RONALD C. MACHEN, JR.
United States Attorney

MARK B. STERN
(202) 514-5089
SYDNEY FOSTER
(202) 616-5374
Attorneys, Appellate Staff
Civil Division, Room 7258
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

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.

TONY WEST
Assistant Attorney General

RONALD C. MACHEN, JR.
United States Attorney

MARK B. STERN
(202) 514-5089
SYDNEY FOSTER s/Sydney Foster
(202) 616-5374
Attorneys, Appellate Staff
Civil Division, Room 7258
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

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 A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 11, 2010

Decided March 26, 2010

No. 09-5099

PRIME TIME INTERNATIONAL COMPANY,
FORMERLY KNOWN AS SINGLE STICK, INC.,
APPELLANT

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:06-cv-01077)

Reed Rubinstein and *Mark Solomons* argued the cause and filed the briefs for appellant.

Sydney A. Foster, Attorney, U.S. Department of Justice, argued the cause for appellee. With her on the brief were *Mark B. Stern*, Attorney. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Before: ROGERS and GRIFFITH, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: In 2004 Congress enacted the Fair and Equitable Tobacco Reform Act (“FETRA”), 7 U.S.C. § 518 *et seq.*, repealing a system of quotas and price supports for tobacco production and providing for payments for ten years to producers and persons who had established marketing quotas to ease the transition. These payments are funded by quarterly assessments on manufacturers and importers of tobacco products. Prime Time International Company, a manufacturer of small cigars, challenged its assessments for three quarters of FY 2005, asserting claims under FETRA, the Information Quality Act, 44 U.S.C. § 3516 note, and the Due Process Clause of the Constitution. The district court granted summary judgment to the Secretary and Department of Agriculture on the FETRA and due process claims, and dismissed the IQA claim pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Our review is *de novo*, and we affirm in part and reverse in part.

I.

Upon “repeal[ing] all aspects of the Federal tobacco support program,” H.R. REP. NO. 108-755, at 440 (2004) (Conf. Rep.), *reprinted in* 2004 U.S.C.C.A.N. 1341, 1518, Congress established a ten-year transitional program under which the United States Department of Agriculture (“USDA”) continues to make payments to farmers formerly covered by marketing quotas. 7 U.S.C. § 518e. The payments come from a newly established Tobacco Trust Fund in the Commodity Credit Corporation at USDA. *Id.* § 518e(a). The Trust Fund is supported by quarterly assessments on tobacco manufacturers

and importers. *Id.* § 518d(b). Under FETRA, assessments are to be allocated among manufacturers and importers of six types of tobacco: cigarettes, cigars, snuff, roll-your-own, chewing, and pipe. *Id.* § 518d(c). The allocation within each class of tobacco product “shall be . . . on a pro rata basis . . . based on each manufacturer’s or importer’s share of gross domestic volume,” with “[n]o manufacturer or importer . . . required to pay an assessment that is based on a share that is in excess of [its] share of domestic volume.” *Id.* § 518d(e)(1), (2). An individual manufacturer’s or importer’s assessment within a class of tobacco product is determined by multiplying its market share of the tobacco class by the total amount of the assessment for the tobacco class. *Id.* § 518d(f). “Market share” is defined as “the share of each manufacturer or importer of a class of tobacco product . . . of the total volume of domestic sales of the class of tobacco product during the base period for a fiscal year for an assessment” *Id.* § 518d(a)(3).

Congress set the class allocations for FY 2005, *see id.* § 518d(c)(1), while authorizing the Secretary of Agriculture to adjust the allocations in subsequent years “to reflect changes in the share of gross domestic volume held by that class of tobacco product,” *id.* § 518d(c)(2). Gross domestic volume is defined as “the volume of tobacco products removed (as defined by section 5702 of Title 26)” and “not exempt from tax under chapter 52 of Title 26 at the time of their removal under that chapter or the Harmonized Tariff Schedule of the United States,” neither of which is germane.¹ *Id.* § 518d(a)(2). “[R]emoved,” as used by

¹ Chapter 52 exempts from taxation several classes of tobacco, including: “Tobacco products furnished for employee use or experimental purposes”; “Tobacco products and cigarette papers and tubes transferred or removed in bond from domestic factories and export warehouses”; “Tobacco products and cigarette papers and tubes released in bond from customs custody”; and “Tobacco products and

FETRA, means “the removal of tobacco products or cigarette papers or tubes, or any processed tobacco, from the factory . . . or release from customs custody.” 26 U.S.C. § 5702(j).² A manufacturer or importer may appeal its assessment to the Secretary, using “any information that is available, including third party data on industry or individual company sales volumes,” and the Secretary “must make any revisions necessary to ensure that each manufacturer and importer pays only its correct pro rata share of total gross domestic volume from all sources.” *Id.* § 518d(i)(2), (i)(4)(B).

As interpreted by USDA, FETRA creates a two-step process for determining the amount of each manufacturer’s or importer’s quarterly assessment. First, assessments are allocated among six classes of tobacco. *Id.* § 518d(c); 7 C.F.R. § 1463.5. For FY 2005, Congress apportioned 2.783% of the total assessment to

cigarette papers and tubes exported and returned.” 26 U.S.C. § 5704. “The Harmonized Tariff Schedule of the United States . . . is maintained and published periodically by the United States International Trade Commission.” 19 U.S.C. § 1202; *see* Chapter 24, Tobacco & Manufactured Tobacco Substitutes (2010), *available at* <http://www.usitc.gov/publications/docs/tata/hts/bychapter/1000C24.pdf>.

² “Removal” or “remove” is defined as:

the removal of tobacco products or cigarette papers or tubes, or any processed tobacco, *from the factory* or from internal revenue bond under section 5704, as the Secretary shall by regulation prescribe, or *release from customs custody*, and shall also include the smuggling or other unlawful importation of such articles into the United States.

26 U.S.C. § 5702(j) (emphasis added).

the cigar class. 7 U.S.C. § 518d(c)(1)(B). Second, USDA allocates each class's share among individual manufacturers and importers based on market share, which turns on the "volume of domestic sales." *See id.* § 518d(f), (a)(3). For cigarette and cigar companies, the "volume of domestic sales" is, according to USDA, determined solely by the number of cigarettes and cigars, without differentiating between large and small cigars. USDA relies on section 518d(g)(3)(A), which provides that "the volumes of domestic sales shall be measured by — in the case of cigarettes and cigars, the number of cigarettes and cigars." *See also* 7 C.F.R. § 1463.7(b)(1). For "other classes of tobacco products," the measurement of the "volumes of domestic sales" shall be "in terms of number of pounds, or fraction thereof, of those products." 7 U.S.C. § 518d(g)(3)(B); *see also* 7 C.F.R. § 1463.7(b)(2). USDA obtains the data needed for these calculations from copies of tax and customs forms (listing the number of cigarettes and cigars and numbers of pounds of other tobacco products "removed" into domestic commerce) that are filed with the Treasury Department and the Department of Homeland Security and submitted to USDA by manufacturers and importers. *See* 7 U.S.C. § 518d(h)(1), (2); 7 C.F.R. § 1463.7(b).

Prime Time is a manufacturer of "small" cigars, which weigh less than three pounds per thousand cigars. *Cf.* 26 U.S.C. § 5701(a)(1) (defining "small cigars"). For FY 2005, USDA initially assessed Prime Time \$339,719 for the first quarter based on a market share for the cigar class of 4.81%; \$455,374 for the second quarter based on a market share of 6.45%; and \$1,152,530 for the third quarter based on a market share of 7.78%. Prime Time filed an administrative appeal of its assessments to the Secretary pursuant to 7 U.S.C. § 518d(i), arguing that USDA's per-stick approach improperly treated differently sized cigars similarly and submitted verifiable A.C. Nielsen sales data as an alternative source for calculating its

market share. The Secretary, acting through the Deputy Administrator for Farm Programs, acknowledged that Prime Time's objection to the inequity of assessing large and small cigars equally was "philosophically well founded," but took the position that the per-stick method was mandated by section 518d(g)(3)(A) of FETRA. *Letter Decision* of Feb. 8, 2006 at 4. The Secretary also took the position that A.C. Nielsen data, which measures across-the-counter sales of tobacco products, did not conform to the requirement that market share calculations be based on the amount of product "removed." *See id.* at 6. The Secretary agreed, however, that Prime Time correctly challenged both the exclusion of non-reporting manufacturers and importers in apportioning assessments and the inclusion of certain expenses in calculating assessments under the transition payment program. The Secretary rejected Prime Time's claim that it was entitled as a matter of due process to examine the industry-wide tax and customs data used by USDA to calculate the assessments on the ground that such information about other companies was made confidential by statute, *see* 26 U.S.C. § 6103. As subsequently revised, Prime Time's FY 2005 assessments for the first, second, and third quarters were \$351,007.23, \$472,017.47, and \$1,135,353.46, respectively.

Prime Time petitioned for review in the district court pursuant to 7 U.S.C. § 518d(j). The district court granted summary judgment for the Secretary and USDA. *Single Stick, Inc. v. Johanns*, 601 F. Supp. 2d 307 (D.D.C. 2009). The district court deferred to USDA's interpretation of FETRA that the per-stick method of determining market share was statutorily mandated as not contrary to congressional intent and a permissible interpretation of the statute under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Single Stick*, 601 F. Supp. 2d at 314. It rejected Prime Time's due process claim regarding access to the data underlying the Secretary's assessments because Prime Time failed to

demonstrate prejudice. *Id.* at 315. Finally, it dismissed Prime Time’s claim that USDA’s failure to respond to requests for disclosure and “correction” of the data underlying the assessments violated the Information Quality Act (“IQA”), 44 U.S.C. § 3516 note, ruling that the IQA did not vest any party with the right to disclosure and correction and that USDA’s failure to respond did not constitute final agency action subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 704. *Single Stick*, 601 F. Supp. 2d at 316–17. Prime Time appeals, and this court’s review is *de novo*, “as if the agency’s decision had been appealed to this court directly.” *Gerber v. Norton*, 294 F.3d 173, 178 (D.C. Cir. 2002) (internal quotation marks omitted).

II.

Prime Time contends that USDA’s interpretation of the Fair and Equitable Tobacco Reform Act is contrary to ordinary construction and plain meaning of the word “volume” in the phrase “gross domestic volume,” which is defined in section 518d(a)(2) as the “volume of tobacco products — removed (as defined by section 5702 of Title 26)” and “not exempt from tax” pursuant to provisions not relevant to this appeal, *supra* note 1. It observes that where statutory terms, such as “volume” here, are not defined in a statute, courts give them their ordinary meaning, citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). USDA responds that “volume” is “clearly explained” in FETRA to mean the number of cigars because section 518d(g)(3) provides that the number of cigars determines the “volume of domestic sales” and thus “market share” under section 518d(f).

Prime Time replies that under USDA’s elastic construction it has calculated the cigar class’s share of gross domestic volume at step one by separately calculating the excise tax paid on large

and small cigars and then adding the two amounts. *See* 70 Fed. Reg. 7007, 7008 (Table 1) (Feb. 10, 2005). But then, at step two, USDA calculates the market shares for individual manufacturers and importers based on their share of the “commingled number of large and small cigars.” Reply Br. 5. This skips a necessary step, Prime Time maintains, because FETRA requires that the allocation within a tobacco class be “on a pro rata basis” with “[n]o manufacturer or importer . . . required to pay an assessment that is based on a share that is in excess of the manufacturer’s or importer’s share of domestic volume.” 7 U.S.C. § 518d(e). Therefore, it argues, after allocating the assessment by class of tobacco products, USDA should divide the cigar class assessment into sub-classes of large and small cigars, with the relative allocation determined by total weight, and then divide the assessments among individual large and small cigar manufacturers and importers on a per-stick basis from the subdivided assessments, satisfying subsection (g)(3)(A). Prime Time contends such a method is required by the plain text of subsection (e) as well as subsection (i)(4)(B), which, upon administrative appeal, requires the Secretary to “make any revisions necessary to ensure that each manufacturer and importer pays only its correct pro rata share of total gross domestic volume from all sources.”

In interpreting a statute, the court begins with the text, and employs “traditional tools of statutory construction” to determine whether Congress has spoken directly to the issue. *See Chevron*, 467 U.S. at 842–43 & n.9. If so, the court’s task is at an end. *See id.* at 842–43. USDA construes section 518d(g)(3)(A) of FETRA to mandate the per-stick method for apportioning assessments among individual manufacturers and importers within the cigarette and cigar class without first sub-dividing the cigar class into large and small cigars. In its view “[t]he statute could hardly be more explicit.” Appellees’ Br. 15. It suggests *Swisher Int’l Inc. v. Schafer*, 550 F.3d 1046 (11th Cir. 2008),

cert. denied, 130 S. Ct. 71 (2009), supports this interpretation. However, *Swisher* provides no analysis, stating only that “[f]or cigarette and cigar sellers, the individual assessments are determined by the number of cigarettes and cigars sold,” while for other tobacco classes, the number of pounds of tobacco is used. *Id.* at 1050.

The plain text of FETRA does not self-evidently vindicate USDA’s two step assessment method. Under FETRA, the “volume of domestic sales” and “market share” are not synonymous with “gross domestic volume.” FETRA provides, for example, that “[t]he volume of domestic sales shall be calculated *based on* gross domestic volume,” 7 U.S.C. § 518d(g)(2) (emphasis added), indicating two different meanings for the terms. And section 518d(g)(3)(A) does not, on its face, require that a compound number of large and small cigars serve as the denominator when calculating a manufacturer’s or importer’s volume of domestic sales on a per-stick basis. Most critically, USDA’s interpretation appears to ignore the pro-rata-basis limitation Congress imposed on assessments within a tobacco class in subsection (e). As interpreted by USDA, it is irrelevant that one large cigar consumes far more tobacco than a small cigar, and so accounts for a far larger segment of the market than its per-stick contribution would indicate. Yet the text and structure of the statute titled the Fair and Equitable Tobacco Reform Act suggests an easy counting metric for cigarettes and cigars may not override a statutory mandate that assessments be “allocated on a pro rata basis” within each class of tobacco product, *id.* § 518d(e)(1). Prime Time’s interpretation suggests that there is at least one way to interpret FETRA’s provisions consistently and in harmony, with none made superfluous or insignificant. *See Corley v. United States*, 129 S. Ct. 1558, 1566 (2009); *City of Anaheim, Cal. v. FERC*, 558 F.3d 521, 522 (D.C. Cir. 2009).

For the purpose of this appeal, the court need only observe that USDA's present interpretation is not mandated by the plain text of FETRA. USDA does not maintain that its interpretation of FETRA is a permissible view of an ambiguous statute entitled to deference under *Chevron* step 2, 467 U.S. at 843. Given that FETRA does not appear to be susceptible of only a single interpretation, we reverse and remand to the district court with instructions to remand Prime Time's FETRA claims to the USDA for further proceedings. *See PDK Labs, Inc. v. U.S. DEA*, 362 F.3d 786, 797–98 (D.C. Cir. 2004).

To the extent Prime Time contends USDA arbitrarily and capriciously overestimated its market share by relying on inaccurate data, USDA adequately explained why it rejected Prime Time's view that A.C. Nielsen data on industry and individual sales volumes should be used in lieu of "removal" data.³ Section 518d(g)(1) directs USDA to calculate the volume of domestic sales and thus market share using "removal" forms and tax returns "as well as any other relevant information provided to or obtained by the Secretary." Section 518d(i)(2) also permits manufacturers and importers to use data on "individual company sales volumes" to challenge their assessments. While these provisions do not require USDA to accept such non-"removal" data or change an assessment based on it, USDA would be advised on remand to offer an explanation in response to Prime Time's argument that the discrepancy in results indicated USDA's data and calculations were inaccurate. For the relevant period, the A.C. Nielsen data showed Prime Time's market share was between 1.05% and 2.5% as compared to between 4.81% and 7.78% computed by USDA. In ruling on

³ Prime Time's objection to increases in its market share following its administrative appeal, which is not part of the USDA record before the court, is subsumed in our remand; we thus expect its objection will be addressed on remand should the issue arise.

Prime Time's administrative appeal, the Secretary pointed out that A.C. Nielsen data "is across-the-counter 'sales' data," tracking the number of cigars sold at the point of sale, while under FETRA "[m]arket shares . . . are computed based on tobacco product 'removal' data." *Letter Decision* at 6; see 7 U.S.C. § 518d(a)(3),(g)(2),(a)(2). Because FETRA adopted the definition of "removal" in 26 U.S.C. § 5702, *supra* note 2, the Secretary concluded USDA had to rely on excise tax and customs forms that report data on "removal." By contrast, because A.C. Nielsen's over-the-counter sales data does not track "removal," it "[is] not (and will not be) synonymous" with "removal" data. *Letter Decision* at 6. USDA was not required to provide more of an explanation for rejecting Prime Time's suggestion it use A.C. Nielsen data instead of "removal" data. See *Tourus Records, Inc. v. Drug Enforcement Admin.*, 259 F.3d 731, 737 (D.C. Cir. 2001). Still, the discrepancy is troubling and inasmuch as the Secretary's explanation was based on his view that section 518d(g)(3)(A) was dispositive, we leave open the question whether, upon remand, A.C. Nielsen data may assume significance should Prime Time renew its argument.

We do not address Prime Time's contention that its due process rights were violated when USDA refused to disclose the tax and customs data underlying its FETRA assessments. On appeal USDA advises that, with Treasury Department agreement, certain previously unavailable industry-wide data sought by Prime Time can now be disclosed without running afoul of the tax confidentiality statute, 26 U.S.C. § 6103. See Appellees' Br. 34; 7 C.F.R. § 1463.8(b)(8). Any due process challenge would therefore arise in a different context upon remand.

III.

The Information Quality Act of 2000 provides that the Director of the Office of Management and Budget (“OMB”) shall, “with public and Federal agency involvement,” issue guidelines by the end of September 2001 that:

provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.

44 U.S.C. § 3516 note (a). The guidelines “apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies,” and require such agencies to “issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information . . . disseminated by the agency.” *Id.* § 3516 note (b)(1), (2)(A). Each such Federal agency shall, under the guidelines, “establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under” the IQA. *Id.* § 3516 note (b)(2)(B).⁴

The OMB Guidelines define “dissemination” as “agency initiated or sponsored distribution of information to the public.”⁵

⁴ The USDA’s IQA guidelines are available at www.ocio.usda.gov/qi_guide/.

⁵ *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by*

67 Fed. Reg. at 8460. The definition excludes “distribution limited to . . . adjudicative processes.” *Id.* On appeal, USDA points to the preamble to OMB’s Guidelines:

The exemption from the definition of “dissemination” for “adjudicative processes” is intended to exclude, from the scope of these guidelines, the findings and determinations that an agency makes in the course of adjudications involving specific parties. There are well-established procedural safeguards and rights to address the quality of adjudicatory decisions and to provide persons with an opportunity to contest decisions. These guidelines do not impose any additional requirements on agencies during adjudicative proceedings and do not provide parties to such adjudicative proceedings any additional rights of challenge or appeal.

67 Fed. Reg. at 8454. USDA’s guidelines, in turn, exclude “documents prepared and released in the context of adjudicative processes.” USDA Information Quality Guidelines, Definitions, § 2, *supra* note 4.

Prime Time sought disclosure and correction under the IQA of the data that USDA used to calculate its FETRA assessments, USDA never responded, and Prime Time challenges that non-response.⁶ USDA maintains that the IQA does not mandate the issuance of information but merely instructs OMB to “provide

Federal Agencies; Republication, 67 Fed. Reg. 8452 (Feb. 22, 2002) (“OMB Guidelines”).

⁶ Prime Time also submitted, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, a request for the data underlying its assessments, which USDA denied and Prime Time did not appeal.

policy and procedural guidance” for ensuring quality, utility, and integrity of information. 44 U.S.C. § 3516 note (a). Prime Time relies, however, on the provision that requires agencies to “establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency.” *Id.* § (b)(2)(B). Regardless, because Congress delegated to OMB authority to develop binding guidelines implementing the IQA, we defer to OMB’s reasonable construction of the statute. *See United States v. Mead*, 533 U.S. 218, 226–27 (2001). 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, and Prime Time does not contend otherwise. Rather, Prime Time attempts to avoid the consequences of the IQA exemption for adjudications on the ground it is waived because USDA did not raise it in the district court.

This court has repeatedly recognized that issues and legal theories not asserted in the district court “ordinarily will not be heard on appeal.” *See, e.g., Horowitz v. Peace Corps*, 428 F.3d 271, 282 (D.C. Cir. 2005); *Hall v. Ford*, 856 F.2d 255, 267 (D.C. Cir. 1988); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984). The reasons for this rule are clear:

[O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, 312 U.S. 552, 556 (1941).

USDA did not raise the “exemption for adjudications” argument in the district court, so normally it would be forfeited. *See generally United States v. Olano*, 507 U.S. 725, 733 (1993). However, in *Singleton v. Wulff*, 428 U.S. 106, 121 (1976), the Supreme Court observed:


The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, *see Turner v. City of Memphis*, 369 U.S. 350 (1962).

The “proper resolution [of the IQA issue] is beyond any doubt,” so this court is free to reach it. The issue involves a straightforward legal question, and both parties have fully addressed the issue on appeal. Consequently, no “injustice” will be done if we decide the issue. *Id.* USDA’s determination of Prime Time’s assessments for three quarters of FY 2005 was an adjudication, attendant to which Prime Time had rights to an administrative appeal and judicial review. *See* 5 U.S.C. § 551(7) (defining “adjudication”); 7 U.S.C. § 518d(i), (j). Prime Time’s contention that USDA violated the IQA when it did not respond to a request to disclose and correct certain information underlying the tobacco assessments thus fails.

Accordingly, we reverse the grant of summary judgment to USDA on Prime Time’s FETRA claims, we do not reach its due process claims in view of USDA’s representation about requested data that will become available to Prime Time upon

remand, and we affirm the dismissal of the IQA challenge, although on a different ground than relied upon by the district court.

EXHIBIT B



The Center for Regulatory Effectiveness

CRE.com

1601 Connecticut Avenue, N.W.
Suite 500
Washington, DC 20009
(202) 265-2383

HOME
ABOUT CRE
ADVISORY BOARD
NPR & IPD
SEARCH
LINKS
ADVOCACY
COMMENTS

Featured Items on TheCRE.com

The Nixon Forum

National Archives Interview: Centralized Regulatory Review

REGweek®: CRE's Regulatory Action of the Week

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*

CRE INTERACTIVE PUBLIC DOCKET CMS COMPETITIVE BIDDING RULE

Interactive Public Docket: Ocean Zoning

CRE BRAZIL

FACA Under Fire

CRE In the News

Interactive Public Docket: Marine Mammals

Data Quality Petitions by Agency

Data Quality Guidelines By Agency

DataQualityAct.US

CyberSecure.US

Issue Sections

REGweek®

- Data Access
- Data Quality
- Regulation by Litigation
- Regulation by Information
- Regulation by Appropriation
- Special Projects
- CRE Watch List
- Emerging Regulatory Issues
- Litigation
- OMB Papers
- Abstracts and Reviews of New Papers
- Guest Column

Services

- Regulatory Advocacy
- Voluntary Standards Program
- CRE Report Card
- Public Docket Preparation
- Interactive Public Docket
- Electronic Regulatory Forum
- Consumer Response Service

MULTINATIONAL LEGAL SERVICES
Legal Counsel

INTERACTIVE Public Docket

Visit the IPD to participate in TheCRE.com's ongoing interactive discussion forums. Click here to post your views and read the opinions of other users.

SUPPORT CRE

LET THE CRE PREPARE A REPORT CARD ON YOUR REGULATION!

Newsletter

Enter your email address and click "Sign-Up" to join CRE's electronic newsletter.

[sign-up](#)

Consumer Response Service

CRE's innovative new service provides consumers with a constructive method of provoking positive change in corporate practices.

[Go to CRS](#)

LET THE CRE PREPARE A PUBLIC DOCKET ON YOUR ISSUE

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

Information Collection Request of the Week

- **The Forest Service Seeks Customer Feedback On PA's Grey Tower**
The Department of Agriculture is seeking information

The OMB.US

Federal Register

Regulatory Watchdogs
WatchDog Watcher

CyberActivist.US

Regulations.Gov

Federal Agency Websites

Regulatory Alerts

Regulatory Think Tanks

Regulations Under Development by Agency

FedLaw Website

Light Truck Forums

TheCMS.org

collection on Grey Towers estates in Milford, PA.

- [ICR of the Week](#)
- [ICR Archive](#)

Recent Regulatory Developments

[Fed Sci](#)

- [Lawmaker Proposes Bill To Limit Automaker Hiring Ex-Regulator](#)

Automakers would be prevented from hiring former safety regulators under a bill introduced by U.S. Senator Barbara Boxer in response to inquiries about Toyota Motor Corp.'s influence on government recall decisions.

- [FCC Examines Reclassifying Broadband As A "Common Carrier"](#)

There could be a movement afoot to reclassify broadband, and eventually, mobile broadband as Title II – also known as a common carrier.

- [Federal Regulators Close Seven Illinois Banks](#)

Seven Illinois banks, including four in Chicago, have been closed by regulators, according to the Federal Deposit Insurance Corp. (FDIC).

- [Regulators Consider New Safety Rules For Offshore Oil Drilling](#)

Federal regulators did not need this week's explosion aboard a state-of-the-art rig to know the offshore drilling industry needed new safety rules: Dozens of deaths and hundreds of injuries over the last several years had already convinced them that changes were needed.

- [Additional News](#) (updated daily)

Updated Tuesday, Friday, Sunday

Science Forum

[Med News](#)

- [EPA Considers Updating Emission Standards](#)

The nation's oil and chemical plants are spewing a lot more pollution than they report to the Environmental Protection Agency.

- [Additional News](#) (updated daily)

Updated Tuesday, Friday, Sunday

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).

- [Click](#) to learn more.



- Additional News

disclaimer

Copyright Notice The Center for Regulatory Effectiveness
[Copyright © 2007]. All right reserved.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5099

September Term 2009

1:06-cv-01077

Filed On: May 10, 2010

Prime Time International Company, formerly
known as Single Stick, Inc.,

Appellant

v.

Thomas J. Vilsack, Secretary of Agriculture
and United States Department of Agriculture,

Appellees

BEFORE: Rogers and Griffith, Circuit Judges, and Edwards, Senior Circuit
Judge

ORDER

Upon consideration of appellees' petition for rehearing filed April 30, 2010, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura Chipley
Deputy Clerk