UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONTE SILVER LIMITED, *Plaintiff,* *v.* **INTERNAL REVENUE SERVICE, et al.** *Defendants*	Civil Action No. 20-cv-1544-CKK

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case centers around Defendants' violation of the Regulatory Flexibility Act ("RFA") which establishes procedural safeguards to protect small businesses from burdensome statutes and regulations aimed at large corporations. Federal agencies must comply with the RFA when they promulgate regulations. Among other provisions, the RFA requires federal agencies to publish a Regulatory Flexibility Analysis which considers alternative regulatory solutions for small businesses, when they issue both proposed and final regulations.

The Tax Cuts and Jobs Act ("TCJA")[1], enacted in December 2017, created the GILTI tax (Global Intangible Low-Taxed Income), codified in Section 951A of the Internal Revenue Code ("Code"). Thereafter, Defendants promulgated proposed and final GILTI regulations. In doing so they violated the RFA by issuing arbitrary and capricious certifications under RFA Section 605(b), which allowed them to circumvent their RFA obligations.

Where an agency issues a proposed or final regulation without complying with the RFA, including by issuing unlawful Section 605(b) certifications, the reviewing court is required by law to remand the regulation to the agency and provide other relief as it deems appropriate.

[1] The TCJA, Pub. L. No. 115-97, 131 Stat. 2054 (2017), was a comprehensive overhaul of the Internal Revenue Code that, among other things, introduced new anti-deferral regimes, including the tax on GILTI under 26 U.S.C. § 951A.

STATUTORY AND LEGAL BACKGROUND

A. The Regulatory Flexibility Act

Under the RFA, federal agencies are required to prepare and make available for public comment an Initial Regulatory Flexibility Analysis at the time they published a proposed rule. 5 U.S.C. § 603(a). Among the issues the analysis must discuss with regard to small businesses are:

> (1) the establishment of differing compliance or reporting requirements that take into account the resources available to small businesses;
>
> (2) the simplification of compliance and reporting requirements for small businesses; and
>
> (3) an exemption for small businesses.

In addition, when issuing the final regulation, agencies are required to prepare a Final Regulatory Flexibility Analysis. That analysis must include a description of the steps that the agency

> has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 U.S.C. § 604. An agency may avoid these requirements only if the head of the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). If

the agency head so certifies, the agency must publish the certification, "along with a statement providing the factual basis for such certification." *Id.*

> Simple boilerplate statements that the rule will not have such an effect are patently inadequate under the RFA. Rather, sufficient analysis must be performed to apprise the regulated community of the reasons for the certification. Moreover, any doubt as to whether a regulatory flexibility analysis should be performed must be resolved in favor of performing the analysis.

H.R. Rep. No. 104-49, pt. 1, at 7 (1995).

The RFA includes a procedure for judicial review of agency compliance with § 605(b) certifications. Any "small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), [. . .] and 610 in accordance with [the APA]." 5 U.S.C. § 611(a). In granting relief under the RFA, a court shall order the agency to take corrective action including, but not limited to, remanding the rule to the agency and deferring the enforcement of the rule against small entities. 5 U.S.C. § 611(a)(4). "Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section." 5 U.S.C. § 611(a)(5).

B. The disputed tax regulations

Prior to the TCJA, large U.S. corporations such as Google and Apple had not been subject to United States taxation on the earnings of their subsidiaries (Controlled Foreign Corporations, or "CFCs") until the earnings were repatriated to the United States parent company. Using sophisticated tax-planning techniques, U.S. multinational corporations shifted huge amounts of income to their CFCs located in low tax jurisdictions, thereby indefinitely deferring U.S. taxation of the income.

The GILTI tax statute (approximately 1,745 words long), changed this. From 2018 forward, each year, U.S. shareholders of CFCs - *i.e.* the U.S. parent corporations – are required to include as their income all profits of their subsidiaries. Unfortunately, the GILTI tax did not distinguish between multinational corporate U.S. shareholders like Google and Apple, on the one hand, and small businesses owned by U.S. shareholders, *i.e.*, individual shareholders (such as Monte Silver), and U.S. entity shareholders of CFCs, such as U.S. partnerships, U.S. trusts, U.S. estates and U.S. "S" corporations.

On October 10, 2018 Defendants issued a notice of proposed rulemaking implementing Section 951A, *Guidance Related to Section 951A (Global Intangible Low-Taxed Income)*, 83 FED. REG. 51,072, 2018 WL 4897210 (proposed Oct. 10, 2018) (AR 145–184) ("Proposed Regulation" or "NPRM"), [available here]. The Proposed Regulation expanded the 1,745-word statute into a highly complex 49,124-word regulation.

The Proposed Regulation did not contain an Initial Regulatory Flexibility Analysis. Instead, the Proposed Regulation avoided that statutory requirement by having then Secretary Mnuchin certify that the Proposed Regulation would not have "a significant economic impact on a substantial number of small entities." NPRM, at 51,087. Treasury so certified despite knowing that small corporate U.S. shareholders constituted 36% of all GILTI filers — the single largest category — and that they would incur substantial compliance costs while generating no GILTI tax liability whatsoever. See **Exhibit A-1**.[2] This certification took no account of the millions of additional U.S. shareholders falling outside that category entirely, including the up to 2,000,000 domestic partnership U.S. shareholders identified in the regulations themselves, as well as U.S. shareholders who are trusts, estates, "S" corporations, and numerous other entity types. See Final Rule, at 29,326 and **Exhibit A-2**. Treasury knew that small businesses, despite owing no GILTI tax, were burdened with billions of dollars in annual GILTI compliance costs. The regulations estimated the annual GILTI compliance costs for trusts and estates to be $9.950 billion. Final Rule, at 29,332

On June 21, 2019, Defendants issued *Guidance Related to Section 951A (Global Intangible Low-Taxed Income) and Certain Guidance Related to Foreign Tax Credits*, 84 FED. REG. 29,288, 2019 WL 2544224 (June 21, 2019) ("Final

[2] Exhibits are cited by exhibit letter followed by page number — *e.g.*, "Ex. A-1" refers to page 1 of Exhibit A.

Rule") (AR 21–103) [available here]. The Final Rule spans approximately 99,441 words—roughly 57 times longer than the statute itself. Even Silver, a U.S. tax attorney, has been unable to comprehend much of this document to this day. The Final Rule was deemed a significant regulatory action, yet it did not include a Final Regulatory Flexibility Analysis. Instead, Defendants again issued a certification under 5 U.S.C. § 605(b). Final Rule, at 29,333.

Defendants' circumvention of the RFA is hardly surprising. A 2015 Government Accountability Office report found that Treasury and the IRS complied with the RFA in only two of more than 200 tax regulations issued between 2013 and 2015.[3] The facts of this case reflect precisely that pattern.

FACTUAL BACKGROUND

Non-party Monte Silver ("Silver") is a United States citizen residing in Israel. He studied, lived and practiced law in the United States until moving to Israel in 1997. Dkt. 33, ¶4. Plaintiff Monte Silver Ltd. ("MSL") is an Israeli corporation and is treated as a corporation for U.S. tax purposes. Silver is and has always been the sole shareholder of MSL. Dkt. 33, ¶5. MSL is a CFC and Silver is a U.S. shareholder, subjecting them to the GILTI Final Rule. Defendants concede that MSL is a small entity for purposes of the RFA. Dkt. 40, at 6, n. 5.

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[3] See U.S. Gov't Accountability Off., *Regulatory Guidance Processes: Treasury and OMB Need to Reevaluate Long-Standing Exemptions of Tax Regulations and Guidance*, GAO-16-720 (Sept. 2016), available here.

Since 2018, MSL has incurred substantial compliance costs to enable Silver to comply with the GILTI regulations. Presently, MSL is incurring such expenses to assist in the preparation of Silver's 2024 GILTI obligations. See Declaration of Ariel Faig ("Faig Decl."), ¶6; Declaration of Monte Silver ("Silver Decl."), ¶5. The time and resources MSL has expended—and will continue to expend—to comply with the GILTI regulation are substantial.

STANDARD OF REVIEW

In cases involving judicial review of agency action – such as this case – "the district judge sits as an appellate tribunal" and the "entire case on review is a question of law." *Am. Biosci., Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (internal quotation marks omitted). In this posture, the court must decide "whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d. 23, 37 (D.D.C. 2017) (internal quotation marks omitted).

Challenges under the RFA are reviewed in accordance with the APA. 5 U.S.C. § 611(a)(2). An agency decision is arbitrary and capricious if it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Lee*

Mem'l Health Sys. v. Burwell, 206 F. Supp. 3d 307 (D.D.C. 2016) *aff'd sub nom. Billings Clinic v. Azar*, 901 F.3d 301 (D.C. Cir. 2018) (internal quotation marks omitted).

ARGUMENT

A. Plaintiff MSL has Article III standing

To establish Article III standing, a plaintiff bears the burden of demonstrating that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016). Where a plaintiff challenges a regulation on a theory of procedural injury – as is the case here – the standing "requirements are modified somewhat." *Nat'l Wildlife Fed. v. U.S. Army Corps of Eng'rs*, 170 F. Supp. 3d 6, 11 (D.D.C. 2016).

In procedural injury cases, the plaintiff must show both (1) that their procedural right has been violated, and (2) that the violation of that right has resulted in an invasion of their concrete and particularized interest. *Ctr. for L. and Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1159 (D.C. Cir. 2005). Increased compliance costs as a result of a procedurally improper rule are sufficient to show such an injury. *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C Cir. 2015); *Ass'n of Priv. Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 458 (D.C. Cir. 2012). Beyond injury, however, a plaintiff must further prove redressability, *i.e.*, that "correcting the alleged procedural violation *could* still change the substantive outcome in the [plaintiff's] favor." *Narragansett Indian Tribal Historic Pres. Office v. FERC*, 949 F.3d 8, 13 (D.C. Cir. 2020) (italics in original).

1. Plaintiff has established an injury-in-fact

The first prong of Article III standing is readily satisfied. As Plaintiff demonstrates below, Defendants violated its procedural rights by issuing arbitrary and capricious certifications under 5 U.S.C. § 605(b) in connection with the Proposed and Final Rule.

As set forth in detail in the accompanying declarations, for the tax years 2024 onward, MSL has suffered, and will continue to suffer, concrete and particularized injury in the form of substantial compliance costs directly traceable to the challenged regulations. Those costs are described and quantified in this brief, in **Exhibit B**, the Faig Decl. and the Declaration of Benjamin Tamir ("Tamir Decl.").

Notably, Defendants do not dispute that MSL incurs compliance costs. Instead, Defendants' entire attack on standing is directed at traceability and redressability—whether MSL's costs are caused by the challenged regulations rather than the underlying statute, and whether a remand could conceivably reduce them. *See* Dkt. 47-1 ("Def. Br.") at 8-13. As demonstrated below, both arguments fail. MSL's costs are directly traceable to discrete provisions of the

GILTI regulations—not merely to the statute—and a remand to Treasury could, in multiple concrete ways, reduce or eliminate those costs entirely.

2. MSL's injuries are traceable to the challenged regulations

Under the traceability factor of Article III standing, a plaintiff must demonstrate "a causal connection between the government action that supposedly required the disregarded procedure and some reasonably increased risk of injury to its particularized interest." *Ctr. for Biological Diversity v. Dep't of the Interior*, 861 F.3d 174, 183 (D.C. Cir. 2017) *quoting Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (*en banc*). Thus, although a plaintiff asserting a procedural injury need not show that proper procedures would have produced a different substantive outcome, it must still establish that the challenged agency action caused a concrete, redressable injury. *Renal Physicians Ass'n v. U.S. Dep't of Health & Hum. Servs.*, 489 F.3d 1267, 1279 (D.C. Cir. 2007); see also Def. Br. at 7-8.

The regulations did not merely create a reasonably increased risk of compliance costs — they actually caused MSL to incur concrete, additional compliance costs directly attributable to the regulations themselves. See Silver Decl., ¶7.

a. The compliance costs MSL incurs are directly related to the regulations

For tax year 2024, MSL has actually incurred compliance costs in the amount of $3,585 that are directly traceable to the regulations. For the years

2025-2026 the total compliance costs caused by the regulation will be $2,910. See **Exhibit B**. These costs arise from specific regulatory requirements—not the statute itself—and reflect the additional burdens imposed by the regulation.

What follows is a summary of the categories of compliance costs and the specific regulatory provisions to which those costs are directly attributable. These categories include: (a) Expenses; (b) Qualified Business Asset Investment ("QBAI") depreciation; (c) General GILTI matters; and (d) GILTI forms and actual compliance. Addressing issues (a) through (c) is a prerequisite to the preparation and filing of the GILTI forms described in (d).

(a) Expenses

(i) Allowable Expenses

On the core issue of which expenses are deductible, the statute allows deductions for expenses "properly allocable" to GILTI income, under § 954(b)(5) of the Code. The statute does not go further than that.

The regulation, however, introduces additional limitations on allowable deductions with no statutory basis. Section 1.951A-2(c)(3) of the regulations states that § 954(b)(5) applies "except as provided in paragraph (c)(5) of this section." Understanding the § 1.951A-2(c)(5) "qualification" and determining whether it was relevant to MSL's expenses and Silver's compliance caused MSL to incur compliance costs of $250. This expense would not have been incurred but for the regulation. See **Exhibit B** and Tamir Decl., ¶ 4(a).

(ii) GILTI Interest Expense and Qualified Interest

The statute refers to interest only in passing. 26 U.S.C. § 951A(c)(1)(B). However, the regulation creates three new concepts related to GILTI income: (1) "Tested Interest Expense" ("TIE"); (2) "Qualified Interest Expense" ("QIE"); and (3) "Qualified Asset" ("QA"). See 26 C.F.R. § 1.951A-4(b); Final Rule, at 29310-29312. TIE is defined as interest expense less QIE. The regulation's definition of QIE is highly confusing and requires complex calculations.[4] It also involves the understanding of a QA under 26 C.F.R. § 1.951A-4(b)(iii)(B).[5]

MSL has paid interest which is TIE. See **<u>Exhibit C</u>** and Silver Decl., ¶ 4. The TIE arises from a loan MSL took to invest in an Israel real estate partnership (the "Israeli Partnership") that (i) conducts an active business and (ii) generates rental income and capital gains which constitute GILTI income. 26 U.S.C. §§ 954(c)(1)(B)(i) and 954(c)(2)(A). See **<u>Exhibit D</u>** and Silver Decl., ¶

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[4] 26 C.F.R. § 1.951A-4(b)(iii)(A):

In general. The term qualified interest expense means, with respect to a controlled foreign corporation for a CFC inclusion year, to the extent established by the controlled foreign corporation, the interest expense paid or accrued by the controlled foreign corporation that is allocated and apportioned to gross tested income of the controlled foreign corporation for the CFC inclusion year under §1.951A-2(c)(3), multiplied by a fraction, the numerator of which is the average of the aggregate adjusted bases as of the close of each quarter of the CFC inclusion year of qualified assets held by the controlled foreign corporation, and the denominator of which is the average of the aggregate adjusted bases as of the close of each quarter of the CFC inclusion year of all assets held by the controlled foreign corporation.

[5] 26 C.F.R. § 1.951A-4(b)(iii)(B)

Qualified asset--(1) In general. Except as provided in paragraph (b)(1)(iii)(B)(2) of this section, the term qualified asset means, with respect to a controlled foreign corporation for a CFC inclusion year, any obligation or financial instrument held by the controlled foreign corporation that gives rise to income included in the gross tested income of the controlled foreign corporation for the CFC inclusion year that is excluded from foreign personal holding company income (as defined in section 954(c)(1)) by reason of section 954(c)(2)(C)(ii) or section 954(h) or (i).

4[6]. The sum of $2,900 in annual interest constitutes TIE, which requires MSL to comply with the relevant regulatory provisions. It bears noting that these provisions are of such complexity that the regulations devote several pages to this issue. Final Rule, at 29,310-29,312. As a direct result, MSL was required to expend $975 in compliance costs to analyze and apply these requirements. But for the regulation, this cost would not have been incurred. See **Exhibit B**; Faig Decl., ¶ 15; Tamir Decl., ¶ 4(c)(i).

b. QBAI (Depreciation under GILTI) [7]

(i) Exemptions to QBAI established by the regulation

Section 951A(d)(1)-(2) of the Code allowed QBAI depreciation for "specified tangible property" that was defined as assets depreciable under Section 167 of the Code. Section 167(b) incorporates Section 168, which determines the methods of depreciation.

Section 1.951A-3(c)(2) of the regulations introduces numerous exceptions to the statute, excluding assets governed by "section 168(f)(1), (2) or (5) and

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[6] Under 954(c)(1) and (2), capital gain is GILTI income if the business is active and the property sold generates rental income. As set forth in **Exhibit D-5**, 34.8% of the equity invested in the partnership is invested in income generating real estate. Thus 34.8% of the interest paid by MSL is TIE. CFC pays annual interest of 25,000 NIS (approximately $8,333 using current exchange rates), in interest. **Exhibit C.** Thus, MSL has $2,900 annual TIE.

[7] QBAI, the unique GILTI depreciation system, is defined in 26 U.S.C. § 951A(d)(1):

> The term "qualified business asset investment" means, with respect to any controlled foreign corporation for any taxable year, the average of such corporation's aggregate adjusted bases as of the close of each quarter of such taxable year in specified tangible property— (A) used in a trade or business of the corporation, and (B) of a type with respect to which a deduction is allowable under section 167.

168(k)(2)(A)(i)(II), (IV), or (V)," and further excepting assets based on "the date the asset was placed in service." Each of these exceptions goes beyond anything found in the statute and is in direct conflict with it.

Thus, to understand these exceptions and determine whether and how they impacted MSL's QBAI calculations require MSL to expend compliance costs of $500. This expense would not have been incurred under the statute; rather it was caused by the regulation. See **<u>Exhibit B</u>**; Tamir Decl., ¶ 4(b)(i).

(ii) Temporary Held Assets

Section 951A(b)(2) of the Code allows 10% depreciation on "QBAI assets." Regulation 1.951-3(h)(1)(i) created an entirely new category of QBAI assets called "Temporary Held Assets." Such assets have different and less favorable depreciation rules.

Under the statute and regulations, MSL is required to include its share of QBAI assets, as well as those assets held by foreign partnerships in which it is a partner ("Partnership QBAI"). 26 U.S.C. § 951A(d)(4).

MSL is a minority partner in the Israeli Partnership. Silver Decl., ¶ 4. Thus, under the regulation, MSL is required to ascertain whether both MSL and the partnership hold Temporary Held Assets, and if so, to add the Partnership QBAI to MSL QBAI. MSL was required to expend compliance costs to ascertain this matter. For 2024, MSL was required to expend compliance costs of $460 to ascertain if MSL and/or the Israel Partnership had such assets and if so, how to comply with GILTI. But for the existence of "Temporary Held Assets" – a purely regulatory creation – this cost would not have been incurred. See **Exhibit B**; Faig Decl., ¶ 13(a) and 13(b); Tamir Decl., ¶ 4(b)(ii).

c. General GILTI regulations

(i) The "tested item" requirement

The statute states that the U.S. shareholder shall include as income the excess of "the aggregate of such shareholder's pro rata share of the tested income of each controlled foreign corporation" over "the aggregate of such shareholder's pro rata share of the tested loss of each controlled foreign corporation." 26 U.S.C. § 951A(b).

Section 1.951A-1(d)(1) of the regulation greatly complicated the statute. First, the regulations introduced the defined term "Tested Items" under § 1.951A-1(f)(5). Departing from the statute's straightforward reference to "aggregate" tested income, the "Tested Items" framework created five distinct categories, each of which must be calculated separately and independently of the others.

These categories include "tested income", "tested loss", "qualified business asset investment", "tested interest expense", or "tested interest income". The regulation then defined calculation methods and restrictions per each tested item. Finally, each tested item was to be converted from foreign currency into U.S. dollars using the specialized "average annual exchange rate." Understanding these requirements and implementing them caused MSL to incur $500 in compliance fees with its U.S. CPA. See **Exhibit B**; Tamir Decl., ¶ 4(c)(ii).

In addition, implementing these requirements through the Israeli CPA caused MSL to incur additional compliance costs in the amount of $245 related to QBAI segregation. See Faig Decl., ¶ 13(c). These costs would not have been incurred but for the regulation.

(ii) Exchange rate

Section 1.951A-1(d)(1) required that each tested item be converted into United States dollars using the average exchange rate. As a result, the following tested items had to be converted to from Israel Shekels to U.S. dollars: (1) tested income; (2) QBAI; and (3) Tested Interest Expense. The Israel CPA charged MSL $45 for this, and an additional $15 for currency exchange for both Qualified Interest Expense and foreign tax credit allocation (see below). But for the requirement that this rate be used, this cost would not have been incurred. See **Exhibit B**; Faig Decl., ¶¶ 13(c), 13(e).

d. GILTI Forms

Defendants concede that Forms 8992 and 5471 and Schedule I-1 (the "GILTI Forms") were created by regulation. Def. Br. at 12. The GILTI Forms cause MSL to incur compliance costs traceable to the regulations for two independent reasons: (i) the regulation-mandated forms impose a specific reporting framework, which include line-by-line reporting of a vast number of components. Complying with these forms is highly complicated and time consuming; and (ii) specific line items on the GILTI Forms require MSL to incur compliance costs that are directly traceable to the regulations.

(i) Complying with the regulation-mandated GILTI Forms

A line-by-line analysis of the GILTI Forms reveals how complex and time-consuming it is to complete them.[8] Tamir Decl., ¶ 6.

Form 5471 (I-1)

Line 1	Requires MSL's gross income from the Israel financial statements be listed here and that this figure be converted to dollars.
Line 2a	Reducing Line 1 by "effectively connected income," meaning MSL's U.S. source income. MSL has investments in U.S. partnerships. This figure must be retrieved from other sections of 5471 and included here.
Line 2b	Reducing Line 1 by Subpart F income, meaning passive income. MSL has various types of passive income. All these types of passive income must be retrieved from other sections of 5471 and included here.
Line 5	Deductions. This figure is unique to the GILTI Forms and does not appear elsewhere in the tax return. Computing this figure requires many steps, including (i) removing QBAI depreciation (see below) and (ii) apportionment of expenses between

[8] Only those lines which involve complex calculations are discussed. The GILTI forms include many more lines which require relatively easy calculations.

	those that relate to GILTI income and those that do not, including only the former. This figure must be converted to dollars.
Line 7	Foreign taxes. Calculate foreign income taxes that are properly attributable to a CFC's tested income (Tested Income/Total income multiplied by foreign taxes paid) This figure must be converted to dollars.
Line 8	QBAI. This figure is unique to the GILTI Forms and does not appear elsewhere in the tax return. Computing QBAI is highly complicated, as detailed in the brief. This figure must be converted to dollars.
Line 9a	Tested Interest expense. This figure, created by the regulation, is unique to the GILTI Forms and does not appear elsewhere in the tax return. After including this number is line 5, it must now be segregated and calculated separately because it is a Tested Item. This figure must be converted to dollars.
Line 9b	Qualified Interest expense. This figure, created by the regulation, is unique to the GILTI Forms and does not appear elsewhere in the tax return. Calculating this item is highly complex but mandatory because it appears on a separate line on the form.. This figure must be converted to dollars.

Form 8992

Form 8992 Schedule A	
Column (g)	Requires calculation of QBAI, including Partnership QBAI. See Line 8 above.
Column (j)	Requires calculation of Tested Interest Expense. See Line 9a and 9b above.
Form 8992 Part II	
Line 2.	Requires calculation of QBAI (Deemed Tangible Income Return), including Partnership QBAI. See Line 8 above.
Line 3a	Requires calculation of Tested Interest Expense. See Lines 9a and 9b above.

(ii) Lines of GILTI Forms attributable to substantive tax issues caused by the regulations.

Completing the GILTI Forms requires MSL to incur compliance costs to address substantive tax issues that are directly caused by the regulations. For example, the GILTI forms require the following:

- For 2024-2025, Form 8992 Part II line 2 requires calculation of QBAI (Deemed Tangible Income Return), including Partnership QBAI. Line 3a requires calculation of Tested Interest Expense from the present, onward into the future.
- For 2024-2025, Form 8992 Schedule A, column (g) requires calculation of QBAI, including Partnership QBAI. Column (j) requires calculation of Tested Interest Expense Schedule 5471(I-1) requires:
    a. conversion of Tested Income from Israel Shekels to Dollars on line 1 – into the future.

b. calculation of QBAI on line 8 for 2024-2025,

c. calculation of Tested Interest Expense and Qualified Interest Expense on lines 9a, 9b and 9d into the future.

- **Foreign tax credit allocation and currency conversion.** Form 5471(I-1) line 7 requires that MSL calculate the foreign income taxes that are properly attributable to the CFC's tested income group. This requires complex calculations multiplying foreign taxes paid by MSL with the ratio of Tested Income to total income. This amount must be converted from functional currency to U.S. dollars. This work caused MSL to incur additional compliance costs in the amount of $95. See Exhibit B. See Faig Decl.13(e). These costs would not have been incurred but for the regulation.

Complying with GILTI requires the timely completion and filing of the GILTI forms. The GILTI forms are highly complex and completing them demands time, which means compliance costs. Tamir Decl., ¶ 6. For 2024, MSL was required to expend compliance costs of $500 to prepare and file the GILTI Forms. See **Exhibit B**; Tamir Decl., ¶ 6. But for the regulations which created the forms, this cost would not have been incurred.

In addition, all the compliance costs MSL incurred were in connection with preparing and filing the GILTI Forms. Thus, for 2024, the total compliance costs MSL incurred, directly related to the regulations, is $3,585. **Exhibit B**. But for the regulations and the GILTI Forms, these costs would not have been incurred.

In sum, Defendants' violation of MSL's procedural rights — rights designed to reduce regulatory compliance burdens — directly caused MSL concrete harm. MSL suffered not merely a heightened risk of increased compliance costs, but actual, demonstrable costs in the amount of $3,585 in 2024 directly attributable to specific provisions of the GILTI regulations. For the years 2024-2026, this amount is $6,495. See **Exhibit B**.

b. The injuries to MSL are not voluntary

Notwithstanding these concrete, regulation-driven compliance costs, Defendants contend that MSL's costs are entirely voluntary — reasoning that because it is Monte Silver, the U.S. shareholder, who is directly regulated, MSL bears no legal obligation to assist in the compliance process. Def. Br. at 10. This argument is without merit for three independent reasons.

First, it is simply not possible for Monte Silver to comply with his GILTI obligations without MSL engaging its Israeli CPA to participate in the process. Tamir Decl., ¶ 3; Faig Decl., ¶ 9. The argument that MSL's involvement is "voluntary" ignores the reality of how GILTI compliance works — the CFC holds the underlying financial data, and without its active participation, compliance is not merely burdensome; it is impossible. The regulations do not merely require reporting; they require specific categories of information determined at the CFC level, which cannot be generated or accessed without affirmative action by the CFC and its accountants.

Indeed, Treasury's own documentation explicitly states that the GILTI Forms are determined at the CFC level. See Instructions for Form 5471 (Rev. 12-2025) at 42 (available here) ("Schedule I-1: This schedule is used to report information determined at the CFC level with respect to amounts used in the determination of income inclusions by U.S. Shareholders under 951A.").While the regulations may require Monte Silver to file the GILTI Forms, those forms require CFC-level information. That information must be generated by MSL and its accountants. The resulting compliance costs are therefore incurred at the CFC level.

Treasury's suggestion that MSL can simply "passively allow access by the U.S. shareholder to its books and records" (Def. Br. at 10–11) is utterly unworkable. MSL does not maintain any tax or accounting documents of its own. Silver Decl., ¶ 1; Faig Decl., ¶ 9. All of MSL's financial data is transferred to the Israeli CPA, who is responsible for everything, from bookkeeping to the payment of periodic taxes, to the preparation of MSL's Israeli financial statements. *Id*. Neither MSL nor Monte Silver independently hold any of these records. *Id*. Even the most passive form of information-sharing would require the Israeli CPA to be engaged and compensated for its services.

Also, passive access to raw data does not produce compliant data. The regulations require processed, categorized, and computed information, not raw data. Is Treasury suggesting that the dumping of vast amounts of data, in Hebrew, onto the U.S. CPA would somehow avoid MSL's compliance costs? Who would pay for the document translation? For the conversion of the data found in MSL's financial statement? For the modification of the financial statements to be GILTI compliant?

Defendants acknowledge that "as a practical matter, one may think a CFC may frequently (if not typically) opt for a more active role, given it may be best positioned to locate and review the relevant information within its files." Def. Br. at 11. The question then becomes: what rational small business owner, given the choice between a more expensive and less functional approach and a less expensive and more effective one, would choose the former? The answer is none — and Treasury's argument that MSL's cost-minimizing participation should be deemed "voluntary" is without merit.

The practical allocation of work here reflects exactly the kind of reasonable business decision one would expect. Monte Silver, a U.S. attorney and MSL's sole owner, realized that GILTI compliance required the division of work between the Israeli CPA and the U.S. CPA. This division of labor is not only reasonable; it is the most cost-effective approach available. Silver Decl., ¶ 2. But cost-effective is not cost-free — the expenses MSL incurs through this arrangement are real, concrete, and directly traceable to the challenged regulations. [9]

[9] Treasury's "voluntary" argument also raises a broader question that it entirely ignores: how does a U.S. shareholder comply with GILTI when the CFC and its foreign CPA are unwilling or unable to cooperate? This problem arises frequently in cases where the U.S. shareholder holds a minority interest and cannot compel the CFC's participation. It is a central practical challenge of the GILTI regime — and one that Treasury failed entirely to address during the rulemaking process. This issue is addressed further below.

Second, the relevant inquiry for standing is not whether MSL is the subject of the rule, but whether the challenged regulations, as applied to its U.S. shareholder, foreseeably affect MSL in the manner it describes. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). The Supreme Court has long recognized that standing does not stop at the party formally bound by a rule — it travels downstream to those who are foreseeably and concretely affected by it. In *Food & Drug Admin. v. All. for Hippocratic Med.,* 602 U.S. 367 (2024) ("*FDA v. Alliance*"), the Court reaffirmed that to establish causation, the plaintiff must "show a predictable chain of events leading from the government action to the asserted injury—in other words, that the government action has caused or likely will cause injury in fact to the plaintiff." *Id.*, at 385. "When the government regulates a business […], the regulation may cause downstream or upstream economic injuries to others in the chain, such as certain manufacturers, retailers, suppliers, competitors, or customers." *Id.*, at 384 [citing, among others, *Barlow v. Collins*, 397 U.S. 159 (1970); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286–87 (1997)].

Each of the cases cited by the Court in *FDA v. Alliance* underscores the point. In *Data Processing*, data processors who were not themselves regulated by the Comptroller's banking ruling nonetheless had standing to challenge it because the ruling foreseeably injured their competitive position. *Ass'n of Data Processing Serv. Orgs.,* 397 U.S. at 152–53. In *Barlow*, tenant farmers who were not the direct targets of the Secretary of Agriculture's amended regulation — their landlords were — had standing because the regulation's practical effects fell squarely and foreseeably on them. *Barlow*, 397 U.S. at 162–64. And in *General Motors*, GMC had standing to challenge a tax exemption that did not apply to it directly, because as a customer of the disfavored class of sellers it suffered concrete economic harm flowing from the government's action. *Gen. Motors Corp.,* 519 U.S. at 286–8.

MSL's position is entirely consistent with this line of authority. MSL is not a stranger to the regulatory scheme — it is the CFC at its center. Its sole shareholder is the regulated U.S. taxpayer. MSL holds the financial data that the regulations require its shareholder to compile and report. The regulations, as applied to Monte Silver, flow directly and foreseeably through MSL, generating real compliance costs at the CFC level. See Silver Decl., ¶ 9.

Third, MSL's participation in the GILTI compliance process is not "voluntary" in any meaningful sense because Monte Silver faces significant civil and criminal penalties if he fails to cause MSL to cooperate.

Civil penalties. Under § 6038(b) of the Code, Monte Silver's failure to file the GILTI Forms result in an initial penalty of $10,000, which may increase to $50,000 for continued non-compliance. In addition, Monte Silver would lose a portion of the foreign tax credits to which he is otherwise entitled. 26 U.S.C. § 6038(c). The loss of those credits would result in double taxation of the same CFC income — once in Israel and again under the GILTI regime. To compound matters, the statute of limitations would never run on the IRS's authority to seek such penalties. 26 U.S.C. § 6501(c)(8).

Criminal penalties. Section 7203 of the Code provides that any person who willfully fails to make a return, maintain required records, or supply required information at the time prescribed by law or regulation is guilty of a misdemeanor and, upon conviction, subject to a fine of up to $25,000 (or $100,000 in the case of a corporation), imprisonment of up to one year, or both, together with the costs of prosecution.

Monte Silver is the sole shareholder, director, and officer of MSL. He must cause MSL to generate and provide the specific information required by the regulations. Were he to refuse to cause MSL to participate in the GILTI compliance process, that refusal would constitute a willful failure to supply required information, exposing him to substantial civil fines and potential criminal liability. Silver Decl., ¶ 9. To characterize MSL's cooperation as "voluntary" in the face of these consequences is divorced from reality.

Treasury's reliance on the cases it cites is misplaced, as none supports the proposition that MSL's compliance costs are self-inflicted.

In *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 456–57 (6th Cir. 2017), the plaintiffs' standing rested on harm the government's action caused to third parties, who in turn harmed the plaintiffs — what the court called "indirect harm." That is not this case. MSL does not allege injury suffered through an intermediary. MSL itself bears the compliance costs directly and unavoidably. *Crawford* is inapplicable.

Grocery Manufacturers Ass'n v. EPA, 693 F.3d 169 (D.C. Cir. 2012), supports Plaintiff's position. The issue in *Grocery Manufacturers* had nothing to do with "voluntary" expenses. Petitioners simply failed to establish causation. As the court there noted: "This convoluted theory of causation will not meet Petitioners' burden […] Any injury to the […] petitioners—speculative at best—depends upon the acts of third parties not before the court. If the contemplated injury is to occur at all, it will require that [third-parties] suffer damages […] and "bring successful warranty or other liability lawsuits against […] petitioners." In this case, MSL, the party who has been adversely affected and aggrieved, is the party bringing the action.

c. Plaintiff's injuries are caused by the regulation

Next, Treasury repeats an argument that courts have consistently rejected — that MSL's injury was caused by the statute, not the regulations. As demonstrated above in great detail, MSL's compliance costs arise directly from specific provisions of the GILTI regulations. See **<u>Exhibit B</u>** and the declarations filed herewith. The injury is regulatory in origin, not statutory.

d. The regulations create new disclosure obligations for MSL

Defendants contend that "unlike for Limited's U.S. shareholder, the challenged regulations do not create a new disclosure obligation for Limited." Def. Br. at 12. This argument lacks merit.

As argued later, MSL itself *is* subject to the regulations, and the regulations therefore impose disclosure obligations on it directly. But even assuming, *arguendo*, that MSL is not directly regulated, the regulations nonetheless caused MSL to incur a wide variety of new compliance costs — each of which corresponds to a specific line on Forms 8992 and 5471 (Schedule I-1) that MSL's U.S. CPA must complete. The QBAI-related costs are reflected on Form 5471 (I-1) Line 8, Form 8992 Line 2, and Form 8992 Schedule A, column (g). The GILTI interest expense-related costs appear on Form 5471 (I-1) Lines 9a, 9b, and 9d, and Form 8992 Line 3a and Schedule A, column (j). The foreign tax credit allocation on Form 5471 (I-1) Line 7. The allowable deductions-related costs are reflected on Form 5471 (I-1), Line 5. There can be no dispute that MSL incurred $3,585 in compliance costs traceable to the regulation in 2024, and that those costs will reach $2,920 for 2025–2026. See **Exhibit B**. These costs were paid to both MSL's Israeli CPA and its U.S. CPA and span the full compliance process — understanding the regulatory requirements, to data gathering and analysis through final filing.

Defendants' second argument — that MSL "necessarily maintains" all required information by virtue of its obligations under other U.S. international tax regimes — is equally unpersuasive. There is a fundamental difference between possessing raw financial data and performing the compliance work necessary to translate that data into completed GILTI Forms. It requires understanding the applicable legal requirements, identifying and compiling the relevant data, performing complex calculations to arrive at the figures the law demands, and ultimately preparing and filing the required forms. The existence of raw data does not eliminate — or even meaningfully reduce — those costs.

Nor are the other regulatory regimes Defendants cite relevant here. The GILTI regulations plainly impose a large number of unique requirements not found elsewhere. Were it otherwise, there would have been no need to promulgate them in the first place. While other regulations cited by Defendants may form part of the broader environment in which GILTI operates, they are not part of the GILTI regime itself. This case concerns Treasury's compliance with the RFA in connection with the GILTI regulations. The foreign tax credit rules and earnings and profits calculations that Defendants invoke are beside the point.[10]

3. The injuries to Plaintiff can be redressed by this Court

In a procedural-injury case, a plaintiff need only show that correcting the procedural violation *could* lead Treasury to alter the regulations in a way that reduces the plaintiff's injury. *Narragansett Indian Tribal Historic Pres. Office v.*

[10] See Def. Br. at 13-14:

> […] (1) Limited's earnings and profits, 26 C.F.R. § 1.6038-2(f)(10)(i); (2) foreign income taxes, 26 C.F.R. § 1.6038-2(f)(10)(ii); (3) distributions out of earnings and profits, 26 C.F.R. § 1.6038-2(f)(10)(iii); and (4) transactions with related parties, 26 C.F.R. § 1.6038-2(f)(11)(i). And must attach schedules reflecting: Limited's profit and loss statements, 26 C.F.R. § 1.6038-2(g)(1), and balance sheet, 26 C.F.R. § 1.6038-2(g)(2) […] Limited necessarily maintains each of those items under some combination of 26 U.S.C. §§ 951, 952, 964, 6001, 6038 and associated regulations.

FERC, 949 F.3d 8, 13 (D.C. Cir. 2020). That standard is plainly met. On remand, Defendants would have numerous available paths to reduce or eliminate MSL's compliance costs, including, but not limited to, the remedies listed below.[11]

1. ***De minimis* thresholds.** Treasury could establish minimum thresholds below which GILTI compliance is not required — for example, a per-shareholder threshold based on the amount of GILTI income, or a per-CFC threshold based on gross sales or net profit. Either approach would eliminate MSL's obligation to incur compliance costs in connection with Monte Silver's GILTI filings in years where those thresholds are not met.[12]

2. ***De minimis* form filing requirements, such as**:

- No obligation to file GILTI Forms below a certain *de minimis* amount of U.S. shareholder GILTI income. GILTI Income data could instead be reported directly on form 1040 line 21, which is where GILTI income is ultimately reported.
- Reliance on standard CFC financial statements, with no need to make any GILTI modifications, below a certain *de minimis* amount of U.S. shareholder GILTI income.

3. ***De minimis* Tested Interest Expense.** Treasury could establish a minimum threshold of Tested Interest Expense below which a CFC or U.S. shareholder would be permitted to treat interest as an ordinary deductible expense. This would eliminate the need to calculate "Qualified Interest Expense" or to segregate it as a separate "Tested Item". This will eliminate the compliance burden of isolating that expense from other deductions and converting it to U.S. dollars separately. For MSL, such a threshold would

[11] It is important to point out that all the following remedies can be issued to U.S. shareholders or CFCs, regardless of whether the U.S. shareholder is an entity or an individual. Neither the GILTI statute nor the regulations distinguish between the different kinds of U.S. shareholders, so there is no reason to assume that such distinction would be made by Treasury on remand.

[12] Treasury plainly has authority to create such *de minimis* rules. It has exercised comparable authority before: in response to pressure from large multinational corporations, Treasury extended the high-tax exclusion under § 954(b)(4) to apply to GILTI income — a significant regulatory concession that went well beyond the text of the statute. *See* Jesse Drucker & Jim Tankersley, *How Big Companies Won New Tax Breaks From the Trump Administration*, N.Y. Times (Dec. 30, 2019), https://www.nytimes.com/2019/12/30/business/trump-tax-cuts-beat-gilti.html. There is no principled reason why Treasury could extend that relief to large corporations while declining to craft analogous protections for small businesses.

eliminate entirely the compliance costs associated with the Tested Interest Expense component of the GILTI calculation.

4. **Simplification of GILTI Forms**. Simplification of GILTI Forms, with less lines to fill out, and less calculations (see FTC), will lead to less compliance costs.

5. **Collapsing expense-related Tested Items.** Treasury could allow CFCs and U.S. shareholders to treat the expense-related Tested Items — QBAI (for tax years until 2026) and Tested Interest Expense — as ordinary expenses, rather than requiring them to be separately calculated, segregated, and converted into U.S. dollars. Eliminating these distinct categories would directly reduce MSL's compliance costs by removing the need to track and report each item separately.

6. **Filing extensions and timing**. Treasury could address the mismatch between U.S. GILTI filing deadlines and the standard reporting timeline. Silver Decl., ¶ 8; Faig Decl., ¶ 7-8. Treasury could provide automatic filing extensions aligned with the Israeli CPA's ordinary reporting schedule, which would eliminate the approximate $620 premium MSL currently must pay its Israeli CPA to expedite preparation of financial statements each year.

7. **Retroactive application of simplified QBAI.** Starting in 2026, GILTI has been simplified by removing QBAI. Allowing U.S. shareholders to use the simplified GILTI without those issues added by the regulations (Temporary Held Assets) for tax year 2025 would reduce MSL's compliance costs. See Faig Decl., ¶13(b).

8. **Plain-language guidance.** Treasury could issue practical guidance on any of the issues which have generated, or will generate, compliance costs set forth herein. Critically, even guidance directed at entity U.S. shareholders would reduce MSL's costs, because the compliance challenges MSL and Monte Silver face are identical to those faced by any CFC and any type of U.S. shareholder. See Faig Decl., ¶17(e); Silver Decl., ¶ 6. Examples include:

   - *QBAI.* Guidance on how to calculate QBAI, including the treatment of temporarily held assets, and how to proceed when a partnership refuses to cooperate or provides incomplete data.

   - *Tested Interest Expense.* Guidance on how to calculate Tested Interest Expense, taking into account both Qualified Interest Expense and Qualified Assets.

- *Access to information.* In many cases, where the U.S. shareholder is a minority shareholder and is unable to obtain data from the CFC — or from a partnership in which the CFC is itself a minority partner — the U.S. shareholder will be unable to comply with GILTI. In those situations, a *de minimis* rule or a safe harbor permitting reliance on the shareholder's "best efforts" would meaningfully reduce compliance costs.
- *Foreign tax credit allocation calculations*
- *Conversion rates. Allow for non-US CPAs to rely on the exchange rate of their choice, if consistently used.*

As set forth in **Exhibit B** and the accompanying declarations, the forms of relief described above could reduce MSL's total compliance costs for 2025-2026 (excluding after 2026 which would be additional savings) by up to $2,910. Redressability is therefore satisfied.

B. MSL has stated a claim under the RFA

1. MSL is adversely affected and aggrieved within the meaning of 5 U.S.C. § 611(a)

The governing standard for judicial review under the RFA is straightforward. Congress defined it plainly: "a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance" with the RFA's requirements. 5 U.S.C. § 611(a)(1). It is not disputed that MSL is a small entity under the RFA. Dkt. 40, at 6, n. 5.

MSL has established that it has incurred — and continues to incur — substantial, concrete compliance costs caused by the regulation. It is thus "adversely affected" by the regulation. The Supreme Court has construed that phrase broadly, to cover anyone "*arguably* within the zone of interests to be protected or regulated by the statute in question." *FDA v. R.J. Reynolds Vapor Co.*, 606 U.S. 226, 232 (2025) [citing *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (italics in original]. A small business bearing the precise compliance burdens the RFA was designed to prevent is not arguably within that zone — it is squarely within it.

Defendants' contrary argument rests on a fundamental confusion between two distinct inquiries: the *substantive reach* of the RFA — which entities an agency must consider when conducting a regulatory flexibility analysis — and the *judicial review* question of which entities may challenge an agency's failure to comply. This argument has been rejected twice. First, in *Silver v. Internal Revenue Serv.*, 569 F. Supp. 3d 5, 12 (D.D.C. 2021) and, second, by this Court in *Silver v. IRS*, 2025 WL 2926379, at *7 (D.D.C. Oct. 15, 2025).

The distinction between the substantive reach of the RFA and its judicial review provision also makes practical sense. The RFA's judicial review provision exists precisely to police whether agencies have properly discharged their analytical obligations — including whether they have correctly identified the universe of regulated small entities and whether their certification is supported by an adequate factual basis. An indirectly affected small entity that bears real and substantial compliance costs – like MSL – has every reason to ensure that analysis is performed rigorously and in good faith. This reflects a deliberate feature of the statute: Congress recognized that regulatory burdens travel downstream, and that those who bear them have a legitimate interest in ensuring the procedural safeguards designed to minimize them are honored.

Defendants' reliance on *Cement Kiln Recycling Coal. v. EPA,* 255 F.3d 855 (D.C. Cir. 2001), *Mid-Tex Elec. Co-Op., Inc. v. FERC,* 773 F.2d 327 (D.C. Cir. 1985), and *White Eagle Co-Op. Ass'n v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009) (Def. Br at 18-19) illustrates the error. Each of those decisions addressed only whether an agency was required to consider the impact of its regulations on indirectly affected entities when performing its RFA analysis. None held — or even considered — that such an entity is barred from seeking judicial review under § 611(a). To read those decisions as silently foreclosing judicial review by indirectly affected small entities would be to import a limitation that Congress did not write and that would render § 611(a)'s broad "adversely affected or aggrieved" language largely superfluous.

The Government's interpretation of § 611(a) must also be rejected on statutory construction grounds. Under the canon against surplusage, courts interpret statutes so that every word and provision has meaning, and none is rendered superfluous or redundant. As the Supreme Court has stated, "it is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Had Congress intended to limit judicial review under § 611(a) to directly regulated entities, it would have said so plainly. Instead, it chose the broader "adversely affected or aggrieved" formulation — language with a well-understood and deliberately inclusive meaning — and that choice must be given independent effect. The Government's attempt to read that language out of the statute is precisely the kind of interpretation the canon against surplusage forbids.

2. In the alternative, MSL is directly regulated by the GILTI Regulations

Even if the Court concludes that § 611(a) requires direct regulation as a prerequisite to RFA standing, MSL satisfies that standard. The question of whether MSL is directly regulated is one for the Court to decide entirely on its own independent judgment. Under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), courts are not to defer to an agency's interpretation of a statute — they are to "decide all relevant questions of law" and "interpret statutory provisions" for themselves. *Id.* at 398 (quoting 5 U.S.C. § 706). This principle applies with full force here: because the agency does not administer the RFA, there is no basis whatsoever for according any deference to the Government's self-serving view of which entities fall within the Act's scope. *Aeronautical*

Repair Station Ass'n, Inc. v. FAA, 494 F.3d 161, 177 (D.C. Cir. 2007); *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1044 (D.C. Cir. 1997).

MSL is directly regulated by the GILTI regulations. The entire purpose of the GILTI regime is to tax the profits of CFCs. The term "CFC" and its derivatives appear over 1,500 times in the regulations alone. More fundamentally, CFC cooperation is not merely helpful to GILTI compliance — it is indispensable. As noted above, the IRS instructions to the GILTI Forms clearly state that the compliance work must be performed at the CFC level.

Finally, Monte Silver is the sole shareholder of MSL. Any failure by MSL to comply would expose Monte Silver personally to significant civil — and potentially criminal — liability.

Accordingly, under either approach, MSL has standing to bring this challenge under § 611(a).

C. Plaintiff is entitled to summary judgment on the merits

Treasury's § 605(b) certification was arbitrary and capricious. Agency action meets that standard when the agency "entirely failed to consider an important aspect of the problem or offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Sinclair Wyoming Ref. Co. LLC v. Env't Prot. Agency*, 114 F.4th 693, 711 (D.C. Cir. 2024). Treasury's certification fails on both counts.

1. Defendants failed to consider several important aspects of the problem

a. Defendants never considered the full universe of U.S. shareholders

The threshold question for any § 605(b) certification is whether the agency has identified the small entities that will bear the regulation's burdens. Treasury never did so here. The GILTI regulations themselves make clear that U.S. shareholders subject to § 951A include not only domestic corporations, but also domestic partnerships, trusts, and estates. Final Rule, at 29,316. These entity shareholders, usually smaller entities, are not a footnote to the GILTI regime. They are, in fact, the largest group of entities regulated by regulation. See **Exhibit A-1**.

The regulations dedicate extensive discussion to domestic partnerships, with the term "partner" and its derivatives appearing 767 times. The regulations state that there could be 2,000,000 partnerships subject to the regulation. Final Rule, at 29,326. The regulations state that trusts and estates alone would incur $10,000,000,000 in GILTI compliance costs. Final Rule, at 29,332. Treasury has also conceded that these entity shareholders constitute the largest group of U.S. shareholders subject to GILTI. See **Exhibit A-1**.

Yet the certification mentions none of them. It addresses only corporate U.S. shareholders, and the administrative record contains no document indicating that Treasury considered any other category of shareholder before issuing its certification. The failure to even acknowledge the existence of the largest group of affected small entities — let alone analyze the regulatory burden on them — is a paradigmatic failure to consider an important aspect of the problem. *State Farm*, 463 U.S. at 43.

b. Treasury failed to address the fundamental problem of access to information

Treasury's certification also ignored a structural problem that lies at the very foundation of the GILTI compliance regime: U.S. shareholders cannot comply without obtaining detailed financial data from their CFCs, yet CFCs have no legal obligation to provide it.

As Treasury itself acknowledged in the regulations, "the Treasury Department and the IRS are aware that a CFC that is a partner in a foreign partnership may have difficulty determining the basis in partnership property" necessary to comply with GILTI, "particularly when the partnership is not controlled by U.S. persons." Final Rule, at 29,305. This is not a theoretical concern — it is a live problem in this very case. As set forth in the accompanying declarations, MSL has been having difficulty obtaining the QBAI data it needs from the Israeli Partnership, which has no legal obligation to provide such information and must expend its own resources to do so. See Faig Decl., ¶ 13(b). MSL is therefore unable to comply with the Partnership QBAI requirements of the GILTI regulations through no fault of its own — a direct consequence of the access problem Treasury never examined.

This problem is not limited to Partnership QBAI. Whenever a U.S.

shareholder holds a minority interest in a CFC — and thus lacks the ability to compel the CFC's cooperation — the shareholder may be unable to obtain the data necessary to comply at all. The consequence is not merely inconvenience: a U.S. shareholder who cannot obtain the necessary information faces the risk of penalties, fines, and potentially criminal liability for noncompliance. This is precisely the kind of structural, systemic issue that a meaningful RFA analysis would have identified and addressed. Treasury's silence on the point in the certification and the administrative record is inexplicable.

c. Defendants failed to assess the economic realities of compliance

Treasury had a "statutory obligation to determine as best it can the economic implications of the rule." *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) [quoting *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005)]. It did not come close to discharging that obligation here.

Treasury's position, pressed throughout this litigation, is that the CFC has no obligation to provide any data to the U.S. shareholder, and that compliance can be achieved simply by giving the U.S. shareholder access to the CFC's books and records. For the reasons set forth above and in the declarations, that position is divorced from reality and would end up costing MSL significantly more compliance costs in the form of (1) the translation of a large volume of foreign-language accounting documents; (2) retaining forensic accountants to reconstruct GILTI-compliant financial schedules from scratch;

and (3) absorbing the inevitable inaccuracies that result from such reconstruction. The cost of this approach would dwarf the cost of the active, cooperative compliance process that MSL and its CPA currently undertake. And such an approach would be far less accurate. Treasury never examined any of this. The administrative record contains no economic analysis of what compliance actually costs, no comparison of alternative approaches, and no engagement with the practical realities that small businesses face in navigating the GILTI regime.

d. Defendants failed to consider the impact of compliance timelines

Finally, Treasury's certification entirely ignored a timing problem that systematically exposes U.S. shareholders to penalties. In many cases, a CFC's non-U.S. accountants will not complete the CFC's standard financial statements until after the U.S. shareholder's GILTI filing deadline has passed. The result is that a significant number of U.S. shareholders are unable to file on time — not because of any failure of diligence, but because the underlying financial data is not available. See Faig Decl., ¶ 8. This exposes them to late-filing penalties that a thoughtful RFA analysis — one that considered the practical mechanics of compliance for small businesses — could have identified and addressed, for example by providing targeted filing extensions. The administrative record contains no indication that Treasury ever considered this issue.

2. The Administrative Record contains no evidence supporting the certification

Treasury's certification is independently arbitrary and capricious for a more fundamental reason: the administrative record contains nothing to support it. When "an agency fails to provide a reasoned explanation, or where the record belies the agency's conclusion, the court must undo its action." *Hisp. Affs. Project v. Acosta*, 263 F. Supp. 3d 160, 172 (D.D.C. 2017), *aff'd in part, rev'd in part,* 901 F.3d 378 (D.C. Cir. 2018); *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999).

The administrative record does not merely fail to support Treasury's certification — it affirmatively contradicts it. Not a single document in the record reflects any consideration of the RFA, any analysis of the regulation's impact on small entities, or any factual basis for concluding that the regulation would not have a significant economic impact on a substantial number of such entities. At the same time, the record itself — through Treasury's own estimates — establishes that the regulation would impose enormous burdens on a very large number of small businesses: $10 billion in projected compliance costs for trusts and estates alone (Final Rule, at 29,332); up to 2 million potentially affected partners (Final Rule, at 29,326); and an acknowledged inability among many affected shareholders to obtain the data necessary to comply (Final Rule, at 29,305). The evidence in the record does not support the certification. It demolishes it.

Defendants' reliance on *Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d 23 (D.D.C. 2017), is misplaced. That case involved a multi-year public rulemaking with extensive small-business analysis, public comment rounds, and targeted exemptions for small-scale operators — a genuine good-faith effort to comply with the RFA. The court deferred to that process, not to an agency's bare assertion that no analysis was needed.

Treasury must make a "reasonable, good-faith effort" to carry out the RFA's mandate. *Associated Builders & Contractors v. Shiu*, 30 F. Supp. 3d 25, 47 (D.D.C. 2014). Treasury cannot meet that standard here. The following four statements from Defendants' brief — each presented as a factual justification for Treasury's § 605(b) certification — are directly contradicted by the administrative record, in most cases by Treasury's own regulations. Taken together, they demonstrate not a good-faith effort to comply, but a predetermined conclusion to avoid compliance entirely:

Small businesses are unlikely to be U.S. shareholders of CFCs (and thus unlikely to be directly subject to the regulations). Def. Br. at 22, citing to NPRM, at 51,087; Final Rule, at 29,333.	The Final Rule itself estimated that trusts and estates subject to GILTI would incur approximately $10,000,000,000 in annual compliance costs. Final Rule, at 29332. Trusts and estates are not large multinational corporations, but among the quintessential small entities the RFA was designed to protect Equally fatal, the Final Rule projected that as many as 2,000,000 domestic partnerships could be subject to GILTI. Final Rule, at 29,326. The sheer volume of regulatory text devoted to

	partnerships — entities that are overwhelmingly small businesses — makes Treasury's claim implausible on its face. Finally, and most significantly, IRS data showed that the largest category of U.S. shareholders subject to GILTI consisted of non-corporate U.S. shareholders, the vast majority of whom were small businesses that generated no GILTI tax liability. See **<u>Exhibit A-1</u>**.
Treasury identified the relevant small entities, acknowledged it lacked relevant data to determine the specific number of entities potentially affected, then made a reasonable projection based on the information available." Def. Br. at 24.	Each part of this statement is contradicted by the record. *First*, Treasury never identified the relevant small entities. Treasury did acknowledge that (i) there are many types of entities that are U.S. shareholders; (ii) that there could be potentially millions of U.S. shareholders; and (iii) their compliance costs were in the billions. Besides that, the certification and the administrative record contained no mention whatsoever of the types of entities, their number, or their GILTI-related compliance costs. These entities — which collectively represent the largest group of U.S. shareholders — were simply never acknowledged. An agency cannot claim to have "identified" the affected entities when the largest affected group does not appear once in its analysis. *Second*, Treasury's claim that it "lacked relevant data" is, and has always been, a misrepresentation. Treasury has long possessed detailed, granular IRS statistics data providing a breakdown of U.S.

	shareholders by entity type, industry, size, and foreign activity.[13] See **Exhibit E**.
Businesses that are U.S. shareholders of CFCs are generally not small businesses because the ownership of sufficient stock of a CFC in order to be a U.S. shareholder generally entails significant resources and investment." Def. Br. at 25 citing to Final Rule, at 29,333.	This statement betrays the fundamental misunderstanding — or deliberate mischaracterization — at the heart of Treasury's certification. The premise that owning CFC stock "generally entails significant resources and investment" *may* be true of large corporate U.S. shareholders like Google and Apple. It is ***not*** true of the millions of individual U.S. citizens living abroad — like Monte Silver — who may own a single small Israeli service company through which they earn their livelihood. It is ***not*** true of the domestic partnerships, trusts, estates, or "S" Corporations that Treasury's own regulations expressly contemplate as U.S. shareholders. Final Rule, at 29,316. See also **Exhibit A-2**.
Treasury projected the total number of U.S. shareholders subject to § 951A to be between 25,000 and 35,000 — itself an insubstantial group in the scheme of federal tax administration. Def. Br. at 25, citing to Final Rule, at 29,333.	This framing reveals the standard Treasury actually applied — and it is not the standard the RFA requires. The RFA asks whether a rule will have a significant economic impact on a *substantial number of small entities*. 5 U.S.C. § 605(b). It does not ask whether the affected entities are a substantial fraction of all taxpayers in the federal system. Moreover, the 25,000–35,000 figure itself understates the affected population. That figure counts only Form 5471 filers and does not

[13] See also trove of IRS data at https://www.irs.gov/statistics/soi-tax-stats-s-corporation-statistics

	account for the estimated 2,000,000 domestic partners who may hold indirect interests through partnerships (Final Rule, at 29,326), or the trusts and estates projected to incur $10,000,000,000 in compliance costs. Final Rule, at 29,332.

CONCLUSION

Defendants' deviation from the requirements of the RFA in this case is not an isolated oversight. Rather, it reflects Defendants' pattern of ignoring the requirements of the RFA and the interests of small businesses when promulgating regulations. As noted above, the Government Accountability Office found that Defendants complied with the RFA in only two of the more than 200 tax regulations issued between 2013 and 2015. Plaintiff submits that allowing Defendants to avoid scrutiny of that record through the invocation of procedural technicalities would serve only to reward the agency for so blatantly disregarding its procedural obligations in developing regulations.

For the foregoing reasons, Plaintiff urges the Court to grant it's motion for summary judgment and deny Defendants' motion for summary judgment.

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Respectfully submitted,

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EXHIBIT LIST

Exhibit	Description
A	IRS data showing small businesses are the largest group of U.S. shareholders subject to GILTI
B	Spreadsheet of MSL's compliance costs traceable to the GILTI regulations (2024–2026)
C	Loan agreement and interest payment records
D	Marathon Real Estate Fund partnership documents and project materials
E	Additional IRS data on U.S. shareholders and CFCs available to Treasury before the § 605(b) certification