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 REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendants' brief largely recycles arguments this Court has already considered, concedes (through silence or otherwise) the majority of MSL's traceable, recurring compliance-cost injuries, and offers no meaningful defense of Treasury's § 605(b) certification or the absence of any supporting administrative record. For the reasons set forth below and in MSL's opening papers, Defendants' motion should be denied and Plaintiff's cross-motion granted.

ARGUMENT

I. MSL HAS ARTICLE III STANDING[1]

A. MSL's compliance costs are not voluntarily incurred: they are ordinary deductible expenses caused by the GILTI regulation

Defendants' opposition to MSL's standing rests on factual assertions about who bears the compliance costs under the GILTI regulation, each of which is incorrect. Defendants claim that "the statute and regulations require the tax to be calculated by U.S. shareholders." Dkt. 53 at 2. This is false. Not only do the statute and regulations not state this, but as established in MSL's opening brief, it is impossible for Monte Silver to compute the tax. Only his CFC, Plaintiff MSL, can do so. Next, Defendants state that "if a third-party accountant must be compensated for Limited's U.S. shareholder to satisfy his obligations, then the regulations require Limited's U.S. shareholder to incur that cost." *Id.* at 3. This statement is also false. Nowhere

[1] Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in Plaintiff's Memorandum of Law in Support of Its Cross Motion for Summary Judgment and Opposition to the Government's Motion for Summary Judgment. Dkt. 51-1.

do the regulations even address the issue of who is required to pay the compliance costs. Finally, Defendants state that "if Limited's U.S. shareholder chose to pass his costs onto his CFC (and Limited chose to pay them), those were voluntary choices, not an inevitable consequence of the regulations." *Id.* at 1. These statements display a fundamental misunderstanding of 26 U.S.C. § 162 which addresses allowable business deductions.

Under § 162, "[t]here shall be allowed as a deduction all the ordinary and necessary expenses incurred in carrying on any trade or business." Treasury regulation 1.162-1(a) expands deductions to include the ordinary and necessary expenditures "directly connected with *or pertaining to the taxpayer's trade or business* […]" [Emphasis added]. 26 C.F.R. § 1.162-1. The Supreme Court has "consistently construed the term 'necessary' as imposing only the minimal requirement that the expense be 'appropriate and helpful' for "the development of the taxpayer's business." *Commissioner v. Tellier*, 383 U.S. 687, 689 (1966), citing *Welch v. Helvering*, 290 U.S. 111, 113 (1933).

As set forth in detail in Plaintiff's briefs and accompanying declarations, MSL's compliance costs pertain to MSL's business, and they were reasonable, appropriate and helpful to the business.

Accordingly, Defendants' "voluntary payment" theory fails. The relevant question is not whether the GILTI regulation makes it an "inevitable consequence" (Dkt. 53 at 1) that MSL write the check to the accountants. The question is whether the GILTI regulation caused MSL to incur ordinary and necessary compliance costs deductible under § 162.[2] It did.

B. MSL has standing because it is the object of the statute and regulation

Defendants rely heavily upon *Diamond Alternative Energy, LLC v. EPA*, 606 U.S. 100 (2025) but failed to address the most significant part of the ruling. Dkt. 53 at 4. In *Diamond*, the EPA rule required automobile manufacturers to reduce production of gas cars in favor of electric cars. Fuel producers (third parties) sued to void the rule. The Court ruled that the fuel manufacturers might be considered an object of the regulations:

> If the government bans hot dog sales in stadiums, then hot dog manufacturers, not just stadiums, might be considered objects of the regulation. If the government prohibits aluminum bats in Little League, then aluminum bat manufacturers, not only Little League may be objects of the rule [...] [T]he situation arises when the government "seeks to **indirectly target a product or service "through a conduit**.**"** [emphasis added]

Diamond, 606 U.S. at 115. See also *Bennett v. Spear*, 520 U.S. 154, 169 (1997); *Energy Future Coal. v. E.P.A.*, 793 F.3d 141, 144–45 (D.C. Cir. 2015). If a hot dog manufacturer is an object and the baseball stadium the conduit, then MSL is clearly the object and Monte Silver the conduit. Defendants expressly concede that the GILTI statute and regulations seek to tax the profits of MSL. "The Internal Revenue

[2] Following Treasury's logic, Google USA is required to pay the compliance costs of all its CFCs worldwide to prepare the GILTI data needed for Google USA's GILTI compliance. Requiring Google USA to ascertain the fair market value of compliance costs incurred by each of its CFCs and then reimburse them is an unmanageable, unreasonable scheme. And Treasury could apply the same logic to many situations where Google CFC costs are somehow connected to Google USA, opening the door to serious uncertainty on basic issues of deductions.

Code contains special rules to tax certain income earned by certain foreign corporations." Dkt. 53 at 1. "Section 951A is a tax imposed on U.S. shareholders for certain income earned by their CFCs." *Id.* at 2. Monte Silver is simply the conduit to reach MSL.

Calculating GILTI requires that MSL and its tax professionals compile and process MSL data to allow the "conduit" (Monte Silver) to report the GILTI income on his GILTI Forms, and thus tax MSL's profits. Every single line in the GILTI forms is based on MSL data. The term CFC and its derivatives appear approximately 1,517 times in the regulations. Under *Diamond,* MSL clearly is the object of the statute and regulation.

The object of government regulations almost invariably satisfies both the injury in fact and causation requirements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). As a result, MSL clearly has Article III standing.

C. MSL has standing because the regulation predictably and necessarily injures MSL

Defendants agree that an unregulated party must show that the third parties will likely react in predictable ways that in turn will likely injure the plaintiffs. Dkt. 53 at 4, citing *Diamond*, 606 U.S. at 116. See also *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 383 (2024).[3] Here, it is axiomatic – indeed, absolutely predictable – that the regulated party (Monte Silver) would require of MSL (the

[3] Here too the term "voluntary" is meaningless. The test is not whether the rule mandated that MSL incur compliance costs. The test is whether it was predictable that MSL would incur these compliance costs.

"unregulated party") to assist him in providing the MSL data required to allow Monte Silver to comply.

Monte Silver's compliance requires MSL data. As stated, all the data included on the GILTI forms is based on MSL data. Dkt. 51-1 at 21-23. Furthermore, only MSL's tax professionals have access to this data. Additionally, access to data is not sufficient. The standard Israel financial data must be processed to produce reportable GILTI data on the GILTI Forms. *Id.* As a result, MSL's Israeli CPA must be retained to generate, compile, and transmit CFC-level information to the U.S. CPA who files the GILTI Forms, which again are based exclusively on MSL data. *Id.*

Monte Silver is the sole shareholder of MSL. Monte Silver faces civil penalties under § 6038(b)-(c) and criminal exposure under § 7203 if he fails to cause MSL to cooperate. For all the above reasons, it is axiomatic, not only predictable, that Monte Silver would require MSL to assist it comply with GILTI compliance.[4]

In attempting to resist this straightforward conclusion, Treasury invented a hypothetical three-shareholder corporation. Dkt. 53 at 3-4. That is not our case. MSL

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[4]As stated in *Diamond*, when third-party behavior is predictable, "commonsense inferences may be drawn." *Diamond*, 606 U.S. at 116. The *Diamond* regulations force automakers to manufacture fewer gasoline-powered vehicles, allowing a long chain of common-sense inferences ultimately leading to the Court finding that Plaintiffs will sell less gas. Here, the connection is far more immediate and axiomatic. As Monte Silver stated in his declaration, "[f]ailure for me to get MSL to comply with GILTI would have subjected me to civil penalties and potential criminal liability which is, of course, out of the question." Dkt. 51-7 at ¶ 9.

is the sole shareholder. Creating hypotheticals unrelated to the case at hand is irrelevant. In addition, as Defendants admit, parties (U.S. or foreign) entering into partnership agreements (domestic or foreign) can address issues of access to tax data and who pays for what. In fact, Defendants clearly state that shareholders can pass the costs to the CFC by majority vote. Such arrangements are a matter of contract, not Article III standing.

D. MSL has clearly established future injury

In its opening brief, MSL detailed eight separate injuries, each directly traceable to the regulations. Dkt. 50-1 at 11–20; Dkt. 50-3. At least four of these injuries are prospective. In their reply, Defendants concede several of these injuries (including prospective ones), ignore others entirely (and thereby concede them), and raise only minor issues to the remainder. Each injury is addressed in turn below.

1. Expenses

(i) **Allowable Expenses**

The statute allows deductions for expenses "properly allocable" to GILTI income, under § 954(b)(5) of the Code. The regulation, however, introduces additional limitations. Defendants concede that the injury is traceable to the regulations: "And fair enough, disqualified basis is a creation of the regulations [...] Limited does not allege that it will incur any future costs under Treas. Reg. § 1.951A-2(c)(5)." Dkt. 53 at 6. MSL, however, acknowledged in its opening brief that this is a one-time, past cost and does not allege it will recur.

(ii) **GILTI Interest Expense and Qualified Interest (prospective)**

The parties agree that § 951A(b)(2) refers to interest expense, allowing a U.S. shareholder to consider interest expense in determining net CFC tested income to the extent the attributable interest income is not itself taken into account. MSL has no tested interest income, so under the statute it claims interest expense attributable to tested income — $2,900 per year. Dkt. 50-1 at 13.

The regulation, however, built an entirely new interest regime atop that single statutory figure, introducing three new concepts: (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 29,310–29,312.

Defendants respond that "the regulations assign names to the various components of that math problem," but "the statute required Limited's U.S. shareholder to calculate his interest expense . . . whether the regulations provided additional instructions on how to do so or not." Dkt. 53 at 8. That is not so. Under the statute, the so-called "math problem" had a single variable — interest expense of $2,900. Dkt. 51-1 at 12-13. The regulation introduced three new variables — TIE, QIE, and QA — each carrying its own sub-variables, formulas, and currency conversions, and each interacting with the others. Complying with that regime requires understanding each variable, computing it, and reconciling it against the others; TIE and QIE must then be converted to dollars and reported separately on the GILTI Forms. The statutory rule is a single proposition: MSL can deduct $2,900 in interest expense. *Id*. The regulatory regime adds significant complexity.

Defendants go further, contending the regulation did not add complexity but reduced it. The administrative record is to the contrary. The Final Rule devotes several pages to comments on this precise point, including comments warning that a new interest-expense standard "would result in additional confusion and complexity." Final Rule at 29,310.

The regulation compounds the burden by defining Tested Interest Expense as a "Tested Item." That designation requires the expense to be identified, siloed from other expenses, calculated under specialized rules, converted into U.S. dollars, and reported on separate, stand-alone lines of the GILTI Forms. None of this is required by the statute. The injury is traceable to the regulation's added layers of complexity, ***and it is prospective***: MSL will incur these costs in every year GILTI applies.

(iii) Tested Interest Expense was not obsoleted by the repeal of QBAI

In addressing a separate injury (temporarily held assets, see below), Defendants suggest in passing that MSL need no longer calculate Tested Interest Expense because Congress's 2026 shift from GILTI to NCTI rendered it, like QBAI, obsolete. Dkt. 53 at 10–11. The argument fails for several independent reasons.

First, the regulatory Tested-Interest regime is independent of QBAI and was not repealed alongside it. The regulation's own definitions of TIE, QIE, and QA make no reference to QBAI. Dkt. 50-1 at 12 fns. 4 and 5. The regulation reinforces that independence in § 1.951A-1(d)(1), which designates TIE a "Tested Item" to be "determined independently of" every other Tested Item — QBAI among them. By the regulation's own terms, then, TIE must be computed independently of QBAI, and the elimination of QBAI does not eliminate it.

Second, the GILTI Forms and their instructions continue to require compliance with the Tested-Interest regime. Form 5471 Schedule I-1, Form 8992, and Form 8992 Schedule A, all retain lines requiring taxpayers to report tested-interest items. On Schedule I-1 alone, lines 9 and 10 — covering TIE, Qualified Interest Expense and Tested Interest Income — remain operative and are independent of QBAI. Treasury's instructions likewise continue to direct taxpayers to the tested-interest provisions of § 1.951A-4(b) without tying them to QBAI in any way.[5]

Third, the resulting ambiguity is itself a present Article III injury. So long as Treasury maintains operative reporting lines and regulations governing tested-interest items, MSL cannot safely disregard them on the strength of Treasury's litigating position alone. MSL is forced to decide, on pain of penalty under 26 U.S.C. § 6038, whether to comply with the Tested-Interest regime in preparing Forms 5471 and 8992. If Treasury believes the regime became obsolete upon the repeal of QBAI, it remains free to amend the regulations, issue guidance, or revise the forms. Until it

[5] The instructions to Form 5471, Schedule I-1 direct taxpayers to compute the CFC's tested interest expense on lines 9a–9d: "[i]n general, see Regulations section 1.951A-4(b)(1)," and to compute tested interest income on lines 10a–10c under § 1.951A-4(b)(2). Under those provisions, Tested Interest Expense is calculated independently of QBAI and must be reported as a Tested Item. The instructions to Form 8992 Schedule A, in turn, refer back to Form 5471, directing taxpayers to enter their pro rata share of tested interest expense "from Schedule I-1 (Form 5471), line 9d." Instructions for Form 8992 (Rev. Dec. 2024) at 3. The forms and instructions thus continue to route taxpayers back to the regulations, yet neither the regulations nor the instructions state that the tested-interest regime may now be disregarded. The taxpayer is left confronting forms that require tested-interest reporting and regulations that still define the concepts — with no authority relieving compliance.

does, MSL bears the compliance burden and the risk of error — a continuing, ***prospective injury*** traceable to the regulation.

2. QBAI (depreciation under GILTI)

(i) Exemptions to QBAI established by the regulation

Section 951A(d)(1)–(2) allowed QBAI depreciation for "specified tangible property," defined as property depreciable under § 167. Section 167(b) in turn incorporates § 168, which prescribes the methods of depreciation.

The regulation departs from that statutory baseline as set forth in the opening brief. Dkt. 51-1 at 13-14. Defendants concede the regulation adds these qualifications but contend it "is a definitional provision that does not impose compliance costs on anyone." Dkt. 53 at 9–10. Whether the provision is styled as "definitional" or not, MSL could not complete its QBAI calculation without first determining whether the regulatory carve-outs applied to its assets and that analysis cost money.

(ii) Temporarily Held Assets (prospective)

Defendants concede that the regulation, not the statute, generated this injury: "as to temporarily held assets, [MSL] is correct that the Final Rule required some analysis contemplated — but not required by — § 951A." Dkt. 53 at 10.

Defendants' sole defense is that the injury is not prospective, because the "temporarily held asset rules were obsoleted going forward by Congress's statutory shift from GILTI to NCTI." Dkt. 53 at 10. As noted above, that defense fails. "Temporarily Held Assets" is a category created entirely by the regulation. Whether the 2026 shift from GILTI to NCTI affected that category, and if so, how, is unsettled, and Defendants offer nothing but their own extra-record litigating position to resolve it.

Defendants concede that while the 2026 statute creates the U.S. shareholder's obligation to calculate NCTI, it is the regulations that create the obligation to prepare and file the GILTI Forms. Dkt. 47-1 at 12. Defendants further concede that, notwithstanding the 2026 amendments, "many of the regulations remain effective for the NCTI version of § 951A." *Id.* at 4. MSL cannot be expected to determine which regulatory obligations survived the amendment, which were modified, and which lapsed, and to stake its compliance position, and its exposure to penalties, on Defendants' brief. That uncertainty is Treasury's to resolve, whether by formal guidance or as part of the RFA analysis it failed to perform. Until it does, MSL bears a continuing, prospective compliance burden traceable to the regulation.

3. General GILTI regulations

(i) The "Tested Item" requirement (<u>prospective</u>)

The statute provides that the U.S. shareholder includes in income its aggregate pro rata share of the tested income of each controlled foreign corporation. 26 U.S.C. § 951A(b). As stated in MSL's opening brief, the regulations substantially complicated that directive and introduced the defined term "Tested Items." Dkt. 51-1 at 15-16. Defendants respond that some Tested Items are statutory terms, with computations set forth in the statute, while interest expense and income are terms that were "introduced by the regulations" but simply refer to calculations the statute requires. Dkt. 53 at 11. Defendants are half right and half wrong. The statute names some of these items; they are wrong that the regulation therefore added nothing. The regulation — not the statute:

- treated each Tested Item separately;
- required each to be siloed from the others;
- prescribed specialized methods for calculating each;
- required each to be converted into U.S. dollars; and
- required several Tested Items to be reported as stand-alone line items on the GILTI Forms.

The regulation took a single aggregate inclusion and disaggregated it into separately computed, separately converted, and separately reported components. That disaggregation imposed compliance costs on MSL in 2024 and will continue to impose them in every year GILTI applies.

(ii) Exchange rate conversion (<u>prospective</u>)

Section 1.951A-1(d)(1) requires that each Tested Item be converted into U.S. dollars using the average exchange rate. As a result, MSL was required to convert from Israeli shekels to U.S. dollars its (1) tested income, (2) QBAI, and (3) Tested Interest Expense. To complete the GILTI Forms, MSL's Israeli CPA also charged separately for currency conversion relating to Qualified Interest Expense and to the foreign tax credit allocation discussed below.

Each of these costs was caused by the regulation and the forms it created, and MSL will continue to incur them so long as GILTI applies. Dkt. 50-1 at 16; Faig Decl. ¶¶ 13(c), 13(e).

Defendants do not address this injury. Their silence should be construed as a concession. *Mosleh v. Howard Univ.*, 2022 WL 898860, at *15 (D.D.C. Mar. 28, 2022) (failing to respond to argument at summary judgment constitutes a concession); *Harris v. Trustees of Univ. of D.C.,* 2021 WL 4399552, at *11 (D.D.C. Sept. 25, 2021) (same).

4. GILTI Forms (<u>prospective</u>)

Defendants concede that the GILTI Forms, e.g., Forms 8992 and 5471 Schedule I-1, were created by regulation. Dkt. 53 at 12. MSL's opening brief detailed, line by line, the time and expense its tax professionals incurred to complete and file these forms. Dkt. 50-1 at 17–20.

Defendants offer no response. They do not dispute the line-by-line showing, do not contest the figures, and do not engage the declarations supporting them. Thus, Defendants have conceded this issue. MSL will incur this cost in each year going forward.

5. Foreign tax credit allocation and currency conversion (<u>prospective</u>)

Plaintiff's opening brief addressed the FTC issue. Dkt. 51-1 at 19-20. Defendants did not respond. They neither dispute that the regulation requires this calculation nor contest the cost. The point is, therefore, conceded. MSL will incur this cost in each year going forward.

E. The injuries to MSL can be redressed by this Court

MSL's opening brief identified eight distinct actions Treasury could consider on remand to reduce or eliminate MSL's prospective compliance costs. Dkt. 50-1 at 30–32.[6] Defendants addressed only two (total exemption from GILTI and simplification of the GILTI Forms) and contest neither persuasively. Defendants said nothing about the remaining six, thereby conceding that each could redress MSL's future injuries. Finally, Defendants' reply brief raises one additional form of relief that can reduce Plaintiff's future compliance costs – whether MSL's compliance costs are deductible under GILTI.[7]

1. Total Exemption from GILTI

Defendants contend that "under the statute's plain text, Treasury lacks authority to exempt any U.S. shareholder from § 951A's reach." Dkt. 53 at 13. But

[6] In its opening brief, MSL argued that all the remedies should be issued to all U.S. shareholders, regardless of whether the U.S. shareholder is an entity or an individual. Neither the GILTI statute nor the GILTI regulation distinguishes 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. In their reply brief, Defendants did not address this point and thus have conceded it.

[7] The GILTI statute allows deductions under § 954(b), which in turn refers to 1.954-1(a). This regulation allows for deductions which are attributable to GILTI income. Defendants' relentless attack on MSL's ability to claim these deductions under § 162 may have an impact on whether taxpayers will be audited for including these expenses under GILTI. This matter must be clarified

Treasury has already extended a comparable regulatory exclusion based on 26 U.S.C. § 954, well beyond the terms of the statute. The high-tax exclusion of § 954(b)(4) is expressly limited to foreign base company income. Treasury nonetheless extended that exclusion to all GILTI income in direct conflict with the statutory limitation— a substantial benefit to large multinationals.

The same statute, § 954, supplies a *de minimis* rule. Section 954(b)(3)(A) provides that where foreign base company income is less than the lesser of 5% of gross income or $1,000,000, none of the gross income is treated as foreign base company income. If Treasury could reach into § 954 to extend the high-tax exclusion to GILTI, it can reach into the same section to extend the § 954(b)(3) *de minimis* rule to GILTI as well.

The RFA confirms Treasury's authority — indeed its mandate — to use that flexibility for small businesses. As the legislative history explains, most IRS interpretive rules involve some aspect of defining or establishing requirements for compliance with the code and a central purpose of the RFA is to reduce compliance burdens on small entities wherever the statute permits. See S. Rep., 142 Cong. Rec. S3242 (Mar. 29, 1996). This case only concerns compliance costs because small businesses in MSL's position owe no GILTI tax. Treasury has clear authority under the RFA to extend the § 954(b)(3) *de minimis* rule to GILTI, and doing so would redress MSL's injury. Redressability is satisfied.

2. Simplification of the GILTI Forms

Defendants' sole response is that "the information returns must be filed by the U.S. shareholder, not the CFC," and that altering the required information "would not alter the CFC-level information the U.S. shareholder must obtain." Dkt. 53 at 13. That response does not withstand scrutiny on either point.

First, as demonstrated, a significant part of this case concerns the compliance-costs-deductions MSL incurs to enable its U.S. shareholder to comply with GILTI. *Second*, simplifying the forms will reduce the CFC-level information MSL must generate and supply, and, hence reduce compliance costs. See Supplemental Declaration of Ariel Faig ("Faig Supp. Decl."), ¶4; Supplemental Declaration of Ben Tamir ("Tamir Supp. Decl."), ¶4.

3. The six unaddressed remedies

MSL's opening brief identified six further forms of relief, each of which would reduce all or part of MSL's prospective compliance costs. Dkt. 50-1 at 30–32. Defendants addressed none of them and have therefore conceded that each could redress MSL's injury. *Mosleh*, 2022 WL 898860, at *15. They are:

- ***De minimis* form-filing requirements.**
    - Relieving U.S. shareholders below a *de minimis* GILTI-income threshold of the obligation to file the GILTI Forms. This would save Plaintiff $1,115 a year. Dkt. 50-3.
    - Allowing GILTI income to be reported directly on Form 1040, line 21, where it is ultimately reported in any event — would save MSL

approximately $500 each year. Dkt. 50-3; Tamir Supp. Decl., ¶3. The transition tax, GILTI's statutory sibling, required no dedicated form at all, but rather only a simple worksheet. See **Exhibit A** to this Brief.

- Permitting reliance on standard CFC financial statements without GILTI modifications below a *de minimis* threshold would save approximately $615. Dkt. 50-3; Faig Supp. Decl., ¶5.

- ***De minimis* Tested Interest Expense.** Establishing a threshold below which interest may be treated as an ordinary deductible expense would save MSL approximately $475 per year. Dkt. 50-3. Faig Supp. Decl., at ¶6. Alternatively, if Treasury's position is that Tested Interest Expense is now obsolete, it could say so in formal guidance, eliminating the risk of error and the attendant compliance costs.

- **Simplification of the GILTI Forms.** Reducing the number of lines and calculations — including the lines identified in MSL's opening brief, Dkt. 50-1 at 17–20 — would directly reduce compliance costs. Faig Supp. Decl., ¶4; Tamir Supp. Decl., ¶4.

- **Collapsing expense-related Tested Items**. Permitting CFCs and U.S. shareholders to treat expense-related Tested Items (QBAI and Tested Interest Expense) as ordinary expenses, rather than requiring each to be separately treated, would reduce MSL's costs by eliminating the need to segregate and separately report those items.

- **Filing extensions and timing.** Providing filing extensions aligned with the Israeli CPA's ordinary reporting schedule would eliminate the approximately $620 premium MSL pays each year to expedite preparation of its financial statements. Faig Supp. Decl. ¶7.

- **Plain-language guidance.** Practical guidance on any of the issues generating future compliance costs would reduce MSL's burden — and, 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 of any CFC and any U.S. shareholder. Such guidance could address, among other things, the calculation of QBAI (including temporarily held assets) from 2025 forward, the calculation of Tested Interest Expense, foreign tax credit allocation, and access to information where the U.S. shareholder holds only a minority interest. Such guidance would also address whether MSL can deduct compliance costs or not. Faig Supp. Decl., ¶8; Tamir Supp. Decl., ¶8.

In sum, any one of these eight measures would reduce MSL's ***prospective*** compliance costs. Collectively, the relief available on remand of the regulations could reduce MSL's costs directly traceable to the regulations by as much as $1,115 each year from 2026 going forward. Dkt. 50-3. Redressability is therefore satisfied.

II. MSL IS ADVERSELY AFFECTED BY THE REGULATIONS

Defendants' statutory standing argument merely repackages the same arguments they advanced, and this Court already rejected, in the context of Article III. As shown in the opening brief and above, MSL is the object of the statute and regulation. But even if MSL were not directly regulated by the regulation, it would still have ***statutory*** standing as it is ***adversely affected*** by the regulations.

Defendants' reliance on *FDA v. R.J. Reynolds Vapor Co.* is particularly misplaced because that decision rejects the very type of narrowing construction Defendants urge here. There, the FDA argued that only the manufacturer, the entity directly regulated by the agency's order, could seek judicial review, notwithstanding Congress's decision to authorize suit by "any person adversely affected." 606 U.S. 226, 236–39 (2025). The Supreme Court ***rejected*** that argument, explaining that if Congress had intended to limit judicial review to the directly regulated entity, it would more "naturally" have said "applicant" rather than "person adversely affected," and that there was "no basis in text or prior practice" for reading such a limitation into the statute. *Id.* at 238.

The same reasoning controls here. Congress did not limit the RFA's cause of action to a "regulated entity." Instead, it extended judicial review to any "small entity that is adversely affected or aggrieved." 5 U.S.C. § 611(a). Yet Defendants ask this Court to rewrite that language by substituting "directly regulated entity" for "small entity adversely affected or aggrieved." The Supreme Court rejected precisely that approach in *R.J. Reynolds*. See also Dkt. 50-1 at 32-35.

Defendants likewise overread *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855 (D.C. Cir. 2001). See Dkt. 53 at 17. That case addressed the scope of an agency's obligation to consider indirect economic effects during the rulemaking process. It did not hold that only directly regulated entities may seek judicial review under § 611(a), nor did it create a categorical rule excluding entities that themselves bear substantial compliance costs merely because another party is subject to the formal legal obligation. Here, unlike the downstream businesses in *Cement Kiln*, MSL itself incurs the compliance costs generated by the challenged regulations. As demonstrated in Plaintiff's opening brief, the calculations, accounting, data collection, translations, and financial analyses required by the regulations are performed at the CFC level and impose substantial costs on MSL itself.

Accordingly, because MSL is a small entity adversely affected by the challenged regulations, it falls within the class of plaintiffs authorized by Congress to seek judicial review under 5 U.S.C. § 611(a). Defendants' contrary interpretation finds no support in the text of the RFA or governing Supreme Court precedent.

III. MSL IS ENTITLED TO SUMMARY JUDGMENT ON THE MERITS

As more fully developed and demonstrated in Plaintiff's opening brief, Treasury's § 605(b) certification was arbitrary and capricious in two respects: **(1)** Treasury entirely failed to consider four important aspects of the problem, including the full universe of U.S. shareholders, the access-to-information problem, the economic realities of compliance, and the impact of filing timelines; and **(2)** the administrative record contains no evidence supporting the certification. See Dkt. 50-1 at 36-45.

Defendants' brief fails to address three of the four important aspects of the problem that Plaintiff raised: (1) access-to-information, (2) the economic realities of compliance, and (3) the impact of filing timelines. Thus, these issues are conceded. *Mosleh*, 2022 WL 898860, at *15.

The only one of the four they did raise was the full universe of U.S. shareholders. "The preamble to the Final Rule is clear that the Treasury Department and the IRS did, to the extent possible, identify the extent to which domestic partnerships, trusts, and estates would be subject to GILTI." Dkt. 53 at 20, citing 84 FR No. 12 at 29332. An analysis of 84 FR No. 12 at 29332 clearly reveals that this argument lacks merit.

First, the cited preamble simply states that trusts and estates will spend $9,950,000,000 complying with OMB Control Number 1545-0092. At the time, Plaintiff reasonably assumed that the Control Number related to GILTI compliance. However, as Defendants made clear, this Control Number relates to *all* compliance costs required by trusts under the code, and is not specific or limited to GILTI. In other words, Defendants did not make any effort whatsoever to identify the unique burden that the GILTI statute or regulation would have on trusts and estates.

Second, the exact same situation applies to partnerships. As the preamble makes clear, up to 2,000,000 partners may be subject to GILTI. And Defendants' response? "[Plaintiff] leaves out the important context that the 2,000,000 potential partners include individuals and foreign persons, who are not 'small entities' that would be part of the RFA analysis." Dkt. 53 at 21. Once again, Defendants failed to do any analysis whatsoever to ascertain how many partnerships were, in fact, subject to GILTI or fell within the RFA's scope.

Finally, the cited preamble merely lists Form 5471 filers by income tax return type. *Id*.

By pointing to the preamble, the government concedes that it was aware that a universe of small entities beyond corporate U.S. shareholders exists. Yet Defendants offer no analysis of the number of such entities, or what burden GILTI imposes on these entities, or whether that burden is significant. That is precisely the analysis the RFA requires before certification.

Defendants fail to point to a single piece of evidence in the administrative record to support the certification. Besides reference to the above preamble, the only thing Defendants do in their brief is attempt to shoot down concrete facts raised by Plaintiff. The facts are clear, however: the administrative record does not contain a single fact to support the certification.

Defendants' reliance on *Kealani Distribution, L.L.C. v. Food & Drug Admin.*, 168 F.4th 741 (5th Cir. 2026) only underscores why Treasury's certification cannot stand. The issue in *Kealani* was whether the FDA's extensive regulatory flexibility analysis was reasonable. The answer was yes because FDA had done the work that the RFA requires. Before promulgating the challenged rule, FDA prepared detailed Initial and Final Regulatory Flexibility Analyses identifying the affected small entities, quantifying compliance costs, evaluating regulatory alternatives, and explaining why the rule's incremental impact would not be significant. See U.S. Food & Drug Admin., *Preliminary Regulatory Impact Analysis; Initial Regulatory Flexibility Analysis; Unfunded Mandates Reform Act Analysis,* Docket No. FDA-2019-N-2854 (2020) [available **here**]; U.S. Food & Drug Admin., *Final Regulatory Impact Analysis; Final Regulatory Flexibility Analysis; Unfunded Mandates Reform Act Analysis*, Docket No. FDA-2019-N-2854 (2021) [available **here**].

Even more telling, when FDA previously promulgated the underlying Deeming Rule,[8] it concluded that the regulation *would* have a significant economic impact on a substantial number of small entities and therefore prepared a comprehensive Final Regulatory Flexibility Analysis rather than attempting to certify its way out of the statute. U.S. Food & Drug Admin., *Final Regulatory Impact Analysis; Final Regulatory Flexibility Analysis; Unfunded Mandates Reform Act Analysis* (May 2016).

Treasury did none of that here. It never identified the universe of affected small entities. It never analyzed the economic realities of compliance. It never quantified the burdens imposed by the GILTI regulations. It never considered meaningful regulatory alternatives. And it never assembled an evidentiary record

[8] The Deeming Rule refers to the rule that deemed all electronic nicotine delivery systems to meet the definition of "tobacco product", subjecting them to the Tobacco Control Act (see *Kealani*, 168 F.4th at 745).

capable of supporting its certification. The RFA requires considerably more. If anything, *Kealani* demonstrates that when an agency takes the RFA seriously, it develops a robust record analyzing affected small entities, compliance costs, and regulatory alternatives. Treasury developed no comparable record here because it never performed the analysis in the first place.

Having failed to conduct the analysis the RFA requires, Defendants' primary defense is that they responded to Silver's comment filed during the notice-and-comment process. Dkt. 53 at 17-20. This argument conflates two entirely distinct things: an agency's duty to respond to public comments under the APA (5 U.S.C. § 553), and an agency's independent statutory duty to conduct a regulatory flexibility analysis (or properly certify why one is unnecessary) under the RFA.[9]

The RFA does not condition the government's analytical obligations on what commenters happen to say. The RFA requires the government to identify the universe of affected small entities and assess the economic impact on them regardless of the comments filed.

The government's claim that it lacked the relevant data when it issued its certification is also incorrect and irrelevant. See Dkt. 53 at 20. Treasury possessed vast amounts of data before the GILTI regulations were finalized. See **Exhibit B** to

[9] Defendants' framing also implies, without basis, that a small business must participate in the notice-and-comment process as a precondition to challenging a final rule under the RFA. No provision of the Act imposes any such requirement. The RFA contains no exhaustion-of-administrative-remedies condition tying judicial review to prior comment submission. By the same token, an agency's response to a comment from one small business does not discharge the agency's independent analytical duties under the RFA toward all other affected small entities.

this brief and Dkt. 50-1 at 42-47; Dkt. 50-6. Treasury cannot claim ignorance of data it already had in hand. And, even if the government lacked the data, that would not excuse the certification. The RFA imposed an affirmative duty on the agency to obtain and analyze the information necessary to assess the regulation's impact on small entities. An agency cannot certify the absence of a significant impact while disclaiming the very data needed to know whether one exists.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiff's opening brief, the Court should deny Defendants' motion for summary judgment and grant Plaintiff's cross-motion for summary judgment.

Date: July 13, 2026

Respectfully submitted,

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