IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SILVER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:20-cv-1544-CKK
	)	
INTERNAL REVENUE SERVICE, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN OPPOSITION TO MOTION OF PLAINTIFF MONTE SILVER, LTD., FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Internal Revenue Code contains special rules to tax certain income earned by certain foreign corporations. After Congress passed the statute enacting that tax, Treasury promulgated comprehensive regulations to assist the taxpayers required to comply with it. Plaintiff Monte Silver, LTD ("Limited") makes no inroads on the conclusions that it lacks standing, fails to state a claim, and cannot succeed on the merits because Treasury's action under the Regulatory Flexibility Act was reasonable and reasonably explained.

ARGUMENT

I. Limited has failed to establish standing to seek prospective relief against the Final Rule.

"[A] plaintiff's burden to demonstrate standing grows heavier at each stage of the litigation." *Silver v. Internal Revenue Serv.*, 531 F. Supp. 3d 346, 357 (D.D.C. 2021) ("*Silver I*"). At summary judgment, Limited needed to "support each element of its claim to standing 'by affidavit or other evidence,'" and it needed to do so "in its opening brief." *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 174 (D.C. Cir. 2012). Limited failed to satisfy that burden. To the extent the regulations impose compliance costs on anyone, it is U.S. shareholders, not CFCs. 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. Thus, even if Limited could identify a provision of the regulations likely to impose future costs, it would still fail to establish standing because the regulations would not impose those costs *on Limited*. Regardless, Limited failed to identify a regulatory provision on which to rest its standing. Each of the provisions Limited identified are either unlikely to impose *future* costs or unlikely to impose costs greater than U.S. shareholders would incur in their absence (or both). In any event, Limited fails to establish redressability, because Treasury lacks statutory authority to exempt any U.S. shareholder from the statute's plain sweep, and simplifying the information returns would not alter the calculations required by the statute.

A. Any costs Limited paid for its U.S. shareholder's benefit were voluntarily incurred.

As explained below, the regulations will not impose future compliance costs on anyone. But the Court need not traverse the path necessary to reach that conclusion, because if the regulations will impose future costs on anyone, it will be U.S. shareholders, not their CFCs. Neither the statute nor the Final Rule regulates Limited. Section 951A is a tax imposed on U.S. shareholders for certain income earned by their CFCs—it is not a tax on CFCs themselves. The statute and regulations require the tax to be calculated, reported, and paid by U.S. shareholders. If a U.S. shareholder fails to properly calculate and pay its § 951A tax, the IRS does not impose tax liability or penalties against the CFC. Similarly, if a U.S. shareholder fails to comply with the information reporting requirements imposed by the Final Rule, the CFC faces no consequence. The statute and regulations do not *require* the CFC to do *anything*.

Limited offers three responses to this argument, but none is persuasive. First, Limited contends that as a practical matter, the regulations require "active participation" by the CFC because "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." D.E. 50-1 at 28. Evidently anticipating the Government's rejoinder that CFC-level *information* does not require CFC-level *participation*, *e.g.*, D.E. 47-1 at 16–17, Limited notes that because it has delegated maintenance of its books and records to a third party accountant, even passive access by its U.S. shareholder to its CFC-level information requires payment to that third party accountant, *see* D.E. 50-1 at 29. In the same vein, Limited then catalogues practical steps necessary to transform its CFC-level information into "compliant data," asking rhetorically who would pay the cost of each step if not the CFC. *Id.* at 29.

Each of its questions has the same obvious answer. The regulations impose obligations on Limited's U.S. shareholder, not Limited. So 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. If documents must be translated or currency must be converted, the obligation to obtain those services rests with Limited's U.S. shareholder, not his CFC. Consider different facts: if Limited had three equal shareholders, only two of whom had tax obligations in the United States, then, (absent consideration), the other shareholder would not rationally agree to use CFC funds to cover expenses incurred for the other two shareholders to satisfy their personal, individual obligations to the

U.S. Government.[1] Here, Limited's single U.S. shareholder elected to pay a number of his personal compliance expenses through his CFC. That was his voluntary choice, not a legal requirement. The regulations imposed some costs on him, not his CFC. Any pocketbook injury to Limited is the result of its U.S. shareholder's voluntary choice, not the challenged regulations.

Second, Limited invokes a line of cases that establishes the rule that an unregulated party can challenge government action if it suffers a foreseeable "downstream" injury from the government's regulation of someone else. D.E. 50-1 at 31–32 (citing, *e.g.*, *FDA v. All. for Hippocratic Med.*, 602 U.S. 367 (2024)); *see also Diamond Alt. Energy, LLC v. EPA*, 606 U.S. 100, 116 (2025). But those precedents rely on reasonable predictions about "*third party* behavior." *Diamond Alt. Energy, LLC*, 606 U.S. at 116 (emphasis added). Here, the Government already conceded the regulations impose at least some costs on Limited's U.S. shareholder. If Monte Silver, as Limited's sole shareholder, elected to send his compliance costs downstream to his CFC, that was his own voluntary choice, not a foreseeable response by an unconnected third party. *Cf. Bost v. Illinois State Bd. of Elections*, 607 U.S. 71, 82 (2026) ("Plaintiffs cannot manufacture standing by voluntarily incurring costs." (citation modified)).

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[1] Depending on the shareholder agreement, it may be possible for the two U.S. shareholders to pass their costs to their CFC by majority vote (over the third shareholder's objection). We introduce the hypothetical to highlight the third shareholder's interests, not to suggest that additional shareholders prevent the voluntary shifting of costs. Our point is the third shareholder would rationally object because the costs are not incurred to satisfy an obligation of the CFC.

Finally, Limited's third response refutes itself. Limited contends that its decision to pay its U.S. shareholder's compliance costs is not voluntary "in any meaningful sense" because its U.S. shareholder "faces significant civil and criminal penalties if he fails to cause [Limited] to cooperate." D.E. 50-1 at 32–34. That assertion shows only that the U.S. shareholder's compliance is not voluntary—a fact no one disputes. Yes, under pain of penalty, Limited's U.S. shareholder must acquire Limited's data from its third party accountant (and pay the cost to do so), acquire whatever translation and currency conversion services are necessary to transform that data into usable form (and pay the cost to do so), calculate his § 951A liability and include it in his gross income (and pay the cost to do so), and complete and submit the information returns required by the regulations (and pay the cost to do so). That Limited's U.S. shareholder faces penalties for noncompliance—and Limited does not—supports the Government's argument, not Limited's.

B. Even if the compliance costs Limited paid were involuntarily incurred, that past injury could not establish standing to obtain prospective relief.

In its opening brief, the Government argued that a cost is not "fairly traceable" to the challenged regulations if that cost must already be incurred for a U.S. shareholder to comply with § 951A. D.E. 47-1 at 17–18. The Government thus charged Limited to identify "specific information it must gather" or a specific "calculation its U.S. shareholder must perform under a provision of the regulations that is not independently required under the statute." *Id.* (emphasis removed). In its response, Limited highlighted four specific provisions of the regulations, but none works to establish standing for prospective relief.

First, Limited contends Treas. Reg. § 1.951A-2(c)(5) required it to spend $250 to determine whether it had any loss or deduction to allocate that was attributable to disqualified basis. D.E. 50-1 at 18. And fair enough, disqualified basis is a creation of the regulations. But it will not cause future injury, because the cost to make that one-time determination has now been incurred. To obtain the prospective relief Limited seeks in this suit, Limited must establish a sufficient likelihood of *future* injury. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024). Limited does not allege that it will incur any future costs under Treas. Reg. § 1.951A-2(c)(5), nor could it. Treas. Reg. § 1.951A-2(c)(5) incorporates the definition of disqualified basis from Treas. Reg. § 1.951A-3(h)(2), which provides anti-avoidance rules to close the temporal gap Congress unintentionally created for fiscal year CFCs (and thus their U.S. shareholders) between the end of § 965's applicability, and the effective date of § 951A. *See* NPRM at 51,077. Under those rules, Limited has already determined whether it transferred property during a disqualified period, calculated any disqualified basis that resulted, and allocated any loss or deduction attributable to that disqualified basis under Treas. Reg. § 1.951A-2(c)(5). Thus, Limited cannot establish a sufficient likelihood of *future* compliance costs under Treas. Reg. § 1.951A-2(c)(5).

Second, Limited identifies $975 in compliance costs it spent to calculate its interest expense under Treas. Reg. § 1.951A-4(b). D.E. 50-1 at 19–20. Limited represents that the statute "refers to interest only in passing," and implies that the obligation to calculate a U.S. shareholder's interest expense derives solely from the regulation. *Id.* at 19. That is wrong. Section 951A defined "global intangible low-taxed income" ("GILTI") as "the excess (if any)" of a U.S. shareholder's "net CFC tested income" for the taxable year, over its "net deemed tangible income return" for the taxable year. I.R.C. § 951A(b)(1) (pre-amendment version). It then defined "net deemed tangible income return" as 10% of the aggregate of the U.S. shareholder's pro rata share of the "qualified business asset investment" ("QBAI") of all of its CFCs, over "*the amount of interest expense taken into account under subsection (c)(2)(A)(ii) in determining the shareholder's net CFC tested income for the taxable year to the extent the interest income attributable to such expense is not taken into account in determining such shareholder's net CFC tested income.*" I.R.C. § 951A(b)(2) (pre-amendment version) (emphasis added).

As the emphasized language shows, the plain text of the statute required a U.S. shareholder to determine its interest expense. And the statute dictated the calculation that must occur: the U.S. shareholder must first calculate its pro rata share of any interest expense incurred by its CFC(s) that is properly allocable to gross tested income. Then calculate its pro rata share of interest income that has already been included in gross tested income to the extent attributable to the interest expense. Then subtract the number resulting from the second calculation from the number resulting from the first. The statute does not mention interest "in passing," it bakes an interest-specific math problem into the basic GILTI formula.

Limited is right that the regulations assign names to the various components of that math problem, but, contrary to Limited's assertion, the regulations do not create the obligation for a U.S. shareholder to perform any leg of that calculation. *Cf.* D.E. 50-1 at 19. The *statute* required Limited's U.S. shareholder to calculate his interest expense—and incur the compliance costs to do so—whether the regulations provided additional instructions on how to do so or not.

In fact, however, the regulations *do* provide additional instructions to help U.S. shareholders comply with the statutory requirements. And those additional instructions reveal that the interest expense was a particularly bad example for Limited to invoke, because it is one of the many choices Treasury made in its regulations designed to *decrease* compliance costs across the board. As Treasury explained in both the NPRM and the Final Rule, § 951A required a U.S. shareholder to calculate the amount of interest income "attributable" to interest expense. NPRM at 51,078; Final Rule at 29,310. That could mean a U.S. shareholder must "determine each item of interest expense with respect to each debt instrument of each of its CFCs to determine whether, and to what extent, the interest income with respect to that debt instrument is taken into account by the U.S. shareholder in determining the shareholder's net CFC tested income." NPRM at 51,078; *see also* Final Rule at 29,310 (noting that at least one commentor opined that the statutory text *required* that approach, else a U.S. shareholder would be able to reduce its interest expense by all interest income included in its tested income, even if that interest income was earned by an unrelated party). That sort of strict tracing approach would have imposed substantial compliance costs on U.S. shareholders (and presented severe administrability challenges to the IRS). Thus, Treasury instead adopted a simpler netting approach, whereby a U.S. shareholder subtracts the aggregate of its pro rata share(s) of the tested interest income of its CFC(s) from the aggregate of its pro rata share(s) of the tested interest expense of its CFC(s) and calls it a day. NPRM at 51,078. In other words, the regulations are not the reason Limited incurred $975 to calculate its U.S. shareholder's interest expense, they are the reason Limited's U.S. shareholder did not spend even more.

Third, Limited says it spent $500 to understand the "numerous exceptions" Treas. Reg. § 1.951A-3(c)(2) "introduces." This contention appears to rest on a misreading of the regulation. Treas. Reg. § 1.951A-3(c)(2) defines tangible property as: "property for which the depreciation deduction provided by section 167(a) is eligible to be determined under section 168 without regard to section 168(f)(1), (2), or (5), section 168(k)(2)(A)(i)(II), (IV), or (V), and the due date placed into service." Read correctly, the definition from the regulation *removes* various exceptions and limitations built into § 168. The provisions following "without regard to" in Treas. Reg. § 1.951A-3(c)(2) create various exceptions to the § 167(a) deduction available for property that would otherwise be depreciable. The regulation is just saying that "tangible property" for purposes of § 951A means depreciable property, and that that definition should be understood "without regard to" whether something in § 168 limits whether (or how much of) a depreciation deduction can actually be taken. It is a definitional provision that does not impose compliance costs on anyone.[2]

And fourth, Limited contends it spent $460 to comply with Treas. Reg. § 1.951-3(h)(1)(i), which provides rules for certain temporarily held assets. D.E. 50-1 at 21–22. As explained in previous briefs, under GILTI, Congress sought to tax U.S. shareholders on their CFCs' intangible income, specifically, by requiring U.S. shareholders to calculate each CFC's total income, then subtracting an amount intended to roughly capture the U.S. shareholder's share of the income one would expect the CFC to earn from its tangible assets. In doing that, Congress recognized that U.S. shareholders controlling more than one CFC could shift tangible assets between their CFCs to improperly avoid tax. *See* I.R.C. § 951A(d)(4)(A) (GILTI version) (delegating authority to Treasury to issue rules for the treatment of temporarily held property). In the Final Rule, Treasury included rules to address Congress's concern. Thus, as to temporarily held assets, Limited is correct that the Final Rule required some analysis contemplated—but not required by—§ 951A.

But Limited did not establish that Treas. Reg. § 1.951-3(h)(1)(i) is likely to cause it to incur *future* costs, and it is not. As was also true with both provisions addressed immediately above, the temporarily held asset rules were obsoleted going forward by Congress's statutory shift from GILTI to NCTI. *See* D.E. 47-1 at 10. Going forward, U.S. shareholders no longer need to calculate QBAI, which means

[2] Limited does not (and could not credibly) allege that it would not determine whether its assets were depreciable in the absence of the challenged regulations.

they no longer need to determine whether property is depreciable, or whether a transfer of property (and the resulting basis) is subject to an anti-avoidance rule. Similarly, U.S. shareholders will no longer need to calculate interest expense. Prospective relief requires a risk of future injury. *All. for Hippocratic Med.*, 602 U.S. at 381. Congress amended the statute going forward, so Limited cannot rest its standing on costs imposed by regulatory provisions that have been obsoleted.

Finally, Limited complains of "general" requirements of the regulations, but these costs are all traceable to the statute. For example, Limited inexplicably represents that Treas. Reg. § 1.951A-1(d)(1) introduces the requirement to calculate "'tested income,' 'tested loss,' 'qualified business asset investment,' 'tested interested expense,' [and] 'tested interest income.'" D.E. 50-1 at 22. That is nonsense. Tested income, tested loss, and QBAI are all statutory terms, with computations set forth in the statute. And, as already explained, tested interest expense and tested interest income are *terms* introduced by the regulations, but the statute requires the substantive calculations those terms refer to. Limited invokes the cost it spent to convert Israel Shekels to U.S. dollars, as if its U.S. shareholder could have calculated his § 951A liability and included it in his U.S. taxable income otherwise.[3] *Cf.* D.E. 50-1 at 23. And it walks through the information returns the regulations require U.S. shareholders to file and flags the items that a taxpayer is not otherwise

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[3] Additionally, the regulations instruct U.S. shareholders to use the average exchange rate to convert a foreign country's functional currency into U.S. dollars, which U.S. shareholders necessarily already do if they claim a foreign tax credit, I.R.C. § 986, or earn subpart F income, Treas. Reg. § 1.952-2(c)(2)(iii).

required to report, without acknowledging that the items must all be calculated under § 951A. *Cf.* D.E. 50-1 at 24–27. The Government does not contend that the information reports do not require any information from U.S. shareholders not otherwise *reported* to the IRS. The point is a U.S. shareholder must already *acquire* every piece of reportable information from its CFC(s) to perform the calculations required by statute.

C. Limited failed to establish redressability because Treasury lacks authority to implement the changes Limited contends could lower its compliance costs.

Finally, even if Limited could show a likelihood of a future injury caused by the regulations (rather than the statute and/or its voluntary choice), Limited would still lack standing. If Limited were likely to incur future compliance costs from the regulations, they could not be redressed by the relief sought.

Limited suggests that after a full RFA analysis, Treasury could alter the regulations to exempt some category of U.S. shareholders from § 951A compliance altogether. D.E. 50-1 at 37. Treasury could not do that. Section 951A applies to "[e]ach person who is a United States shareholder of any controlled foreign corporation."[4] I.R.C. § 951A(a). And the statute does not include any delegation of authority to Treasury to adjust that unequivocal definition. *See generally* I.R.C.

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[4] Congress did not extend § 951A to individual U.S. shareholders by mistake. It clarified in § 951A(d)(1)(A) that amounts a U.S. shareholder includes in his gross income under GILTI/NCTI should be treated the same way as subpart F income is already treated for purposes of applying various other statutory provisions, including—expressly—§ 962, which only applies to individuals.

§ 951A. Thus, under the statute's plain text, Treasury lacks authority to exempt any U.S. shareholder from § 951A's reach.

Limited responds that Treasury must be able to exempt small businesses under § 951A because it "extended the high-tax exclusion under § 954(b)" for the benefit of "large multinational corporations." D.E. 50-1 at 37. Putting to the side the incompatibility of Limited's goose-gander inputs, that is not how statutory authority works. Section 951A(b)(2)(A)(i) lists several categories of income a U.S. shareholder should subtract from (each of) its CFC's gross income to determine the CFC's "tested income." One of those categories is "gross income excluded from the foreign base company income (as defined in section 954)." I.R.C. § 951(a)(b)(2)(A)(i)(III). In contrast to the absolute language Congress used to set the scope of NCTI/GILTI applicability in § 951A(a), § 954(b)(4) excludes certain income "if the taxpayer establishes to the satisfaction of the Secretary that such income was subject" to a certain rate of foreign tax. Given that statutory difference, Treasury's ability to "extend[] the high-tax exclusion under § 954(b)" reveals nothing about Treasury's (lack of) authority to exempt some category of U.S. shareholders from § 951A(a).

Alternatively, Limited identifies alterations Treasury could make to simplify the information returns required by the regulations. D.E. 50-1 at 37–39. But the information returns must be filed by the U.S. shareholder, not the CFC. And even if Treasury altered the information U.S. shareholders were required to report, that change would not alter the CFC-level information the U.S. shareholder must obtain to comply with the statute. In other words, to the extent Limited currently incurs costs, it would incur the same costs if Treasury altered the information returns.

II. Limited fails to state a claim under the RFA.

The § 951A regulation does not directly regulate Limited; as a result, Limited falls outside the zone-of-interests that the Regulatory Flexibility Act is designed to protect. Limited's arguments to the contrary ignore the reality of who actually bears the burden of complying with § 951A and its regulation. They also would improperly expand the appropriate scope of the zone-of-interests.

As this Court already explained, Limited is not a small entity that is "directly affected" or "regulated by" the challenged regulations. *Silver v. Internal Revenue Serv.*, 2025 WL 2926379 at *7 (D.D.C. 2025). The § 951A tax is imposed on the U.S. shareholder, reported by the U.S. shareholder, and paid by the U.S. shareholder. *See id.* If the tax is miscalculated or unpaid, Limited (as the CFC) risks no direct penalty. Neither is Limited (as the CFC) responsible for any costs that Silver (as the regulated U.S. shareholder) may incur in satisfying Silver's obligations under § 951A and its regulation, as already shown above.

Limited's specific examples do not aid its cause. To support its erroneous contention that it is "directly regulated" by the § 951A regulations, Limited makes the equally erroneous statement that the "entire purpose of the GILTI regime is to tax the profits of CFCs." D.E. 50-1 at 43. To the contrary, the true purpose and scope of the GILTI regime are to tax *U.S. shareholders* on certain income of their CFCs. The structure of the statute makes this clear. For example, if a CFC was 51%

owned by a U.S. shareholder and 49% owned by non-U.S. shareholders (either foreign persons or U.S. persons owning, directly, indirectly, or constructively, less than 10%), only 51% of the CFC's relevant income would be taxed under the GILTI regime. If the purpose of the GILTI regime was to regulate and tax the CFC, 100% of the relevant income would be treated as within scope. The TCJA "transformed U.S. corporate taxation from a worldwide system . . . toward a territorial system." *Moore v. United States*, 36 F.4th 930, 933 (9th Cir. 2022), *aff'd*, 602 U.S. 572 (2024). The *Moore* opinion describes how these taxes are not CFC-level taxes:

> Congress has devised more nuanced rules for foreign entities, such as foreign corporations. For legal and practical reasons, Congress generally does not directly tax foreign corporations, including American-controlled foreign corporations, on the income that they earn outside of the United States. Instead Congress has imposed some taxes on income of those corporations on a pass-through basis.

Id.

For the same reason, Limited is wrong when it claims that the "IRS instructions to the GILTI Forms" require "the compliance work [to] be performed at the CFC level." D.E. 50-1 at 43. This is simply not true. The forms state that the information provided must be provided on a CFC-by-CFC basis (as opposed to an aggregate basis for all of a U.S. shareholder's CFCs). This does not require compliance work by the CFC itself but by the U.S. shareholder. As already addressed above, this does not mean the CFC is charged with the U.S. shareholder's responsibility to satisfy the shareholder's obligations under § 951A and its regulation.[5]

Even assuming for the sake of argument that Limited truly faced any of the harms it complains of, all of Limited's arguments would give it statutory standing simply by meeting the qualifications for standing under Article III. But binding authority instructs otherwise. As Defendants already noted in their opening brief, the Supreme Court has concluded that the "zone of interests" test is "no[t] so broad as to encompass every person with Article III standing." *FDA v. R. J. Reynolds Vapor Co.*, 606 U.S. 226, 233-34 (2025). The Court did so in construing the term "'[a]dversely affected' (and its variations like 'adversely affected or aggrieved')," which it described as "a term of art with a 'long history in federal administrative law.'" *Id.* at 232. In the end, the Regulatory Flexibility Act cause of action thus extends only to a plaintiff "with an interest arguably sought to be protected by [the Regulatory Flexibility Act].'" *Id.* at 236. And the D.C. Circuit confirms the Regulatory Flexibility Act does not protect the interests of indirectly regulated entities. *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001).

[5] The fact that Limited is a foreign corporation underscores the point that it is beyond the scope of the RFA. As a foreign corporation that is not directly regulated by the tax statutes at issue, it should not be surprising that Limited does not get a say regarding the regulation of U.S. taxpayers. In enacting the RFA, Congress focused on "the health, safety and economic welfare of the Nation." Pub. L. 96-354, § 2(a)(1), 94 Stat. 1164, 1164. It is significant that a component of the Small Business Administration, the Chief Counsel for Advocacy of the SBA, is tasked with monitoring compliance with the RFA. 5 U.S.C. § 612(a). The policy of the SBA is to "aid, counsel, assist, and protect the interests of the nation's small businesses," 13 C.F.R. § 101.101(a)(2), not the small businesses of other countries.

To the extent Limited tries to argue that "the Government's" interpretation of "adversely affected or aggrieved" is too limited, *see* D.E. 50-1 at 34, Limited's quarrel is not with the Government – it is with the binding authority that the Government has cited. And Limited gives no compelling reason to depart from those precedents. Limited's observation that *Cement Kiln* and similar cited cases did not include a standing challenge misses the point. As even Limited acknowledges, those cases address "whether an agency was required to consider the impact of its regulations on indirectly affected entities when performing its RFA analysis." D.E. 50-1 at 41. The answer in each case was no. That is the defining principle that shows that indirectly affected entities, like Limited here, fall outside the zone of interests that the Regulatory Flexibility Act was designed to protect. Because the Regulatory Flexibility Act is not meant to protect the interests of an indirectly affected entity like Limited, Limited lacks statutory standing to invoke the Act's judicial review procedures.

III. Even if Limited had both constitutional and statutory standing, the Government is entitled to summary judgment on the merits.

Even if the Court reaches the merits, Limited cannot succeed. As the Government already described in its opening brief, Treasury complied with the procedural requirements of the Act, judicial review under the Regulatory Flexibility Act is extremely deferential,[6] and Treasury's explanations are reasonable. Indeed,

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[6] The Fifth Circuit recently upheld a § 605(b) certification made by the Food and Drug Administration, reasoning in part that a complaint made about a "substantive

(continued...)

Treasury responded to the one and only comment that it received that was directed to its § 605(b) certification. Final Rule at 29,333; AR at 526–562.

That comment was from Silver, who is Limited's U.S. shareholder (and Limited's sole shareholder).[7] In his principal comment, Silver listed only features of the *statute* in support of his claim that "any regulations under 951A will have a significant impact on a very large number of small businesses." AR at 526–27. The comment failed to identify any aspect of the proposed regulation that worsened the impact of § 951A on small businesses, nor did it offer suggestions by which regulations could blunt the impact of § 951A on small businesses. Treasury adequately responded to this aspect of Silver's comment by explaining its view that the impact of the regulations it promulgated was to decrease compliance costs for all U.S. shareholders, including small businesses. *E.g.*, NPRM at 51,086; Final Rule at 29,324–31. The comment arguably required *no* response, as it articulates no objection to the actual regulations, instead asserting that "*any* regulations under 951A will have a significant impact on a very large number of small businesses." AR at 526–27 (emphasis added). And it is plainly wrong. To the extent the regulations

factual conclusion underlying the [agency]'s certification" "is outside the scope of judicial review of alleged RFA violations." *See Kealani Distribution, LLC v. Food & Drug Administration*, 168 F.4th 741, 749 (5th Cir. 2026).

[7] Treasury received no other RFA-related comments, including from regulated entities or interested stakeholders. Even the Chief Counsel for Advocacy of the Small Business Administration, to whom Treasury had submitted the proposed regulations, had nothing to say about Treasury's initial determination that the proposed regulations would not have a significant economic impact on a substantial number of small entities.

simply implement statutory requirements, they have no economic impact at all. As explained in the Government's opening brief, many provisions of the regulations simply repeat the statute. And where the regulations diverge, the net effect is to provide additional clarity for U.S. shareholders' benefit.

Silver's comment then incorporated the comment he had submitted in response to *different* proposed regulations providing guidance on a *different* statute, which did not address small business shareholders at all. AR at 529–44. The second comment argued small businesses are *impacted* by the relevant provision of the TCJA (there, 26 U.S.C. § 965, here, 26 U.S.C. § 951A), but did not claim that small businesses are *directly regulated* as U.S. shareholders of CFCs. *E.g.*, AR at 534. The comment misunderstood the relevant small businesses to *be* the CFCs, not the domestic entities that *own* CFCs. Treasury expressly addressed this portion of the comment in the Final Rule, explaining it was inapposite. Final Rule at 29,333. The comment "was principally concerned with U.S. citizens living abroad that owned foreign corporations directly or indirectly through other foreign entities." *Id.* But "U.S. citizens living abroad are not small business entities." *Id.* Nor are CFCs directly regulated. *Cf. id.* "[T]hus, no small entity is affected in [the comment's] scenario." *Id.*

Treasury received no other comments objecting to its § 605(b) certification. Limited now raises objections that neither it nor its U.S. shareholder made when they had the opportunity to comment on the proposed regulation, but all to no avail.

Limited now objects to various substantive factual conclusions underlying Treasury's § 605(b) certification that are "outside the scope of judicial review of alleged RFA violations." *See Kealani Distribution,* 168 F.4th at 749, *aff'g Kealani Distribution, LLC v. Food & Drug Administration*, 2025 WL 474904 (E.D. Tex. Feb. 12, 2025) ("claim that the [agency]'s factual basis for the [§ 605(b)] certification . . . was erroneous or otherwise substantively flawed is not a procedural attack cognizable under the RFA."). Limited objects that Treasury did not identify "the small entities that will bear the regulation's burdens," incorrectly claiming that Treasury focused on domestic corporations as potential U.S. shareholders while ignoring domestic partnerships, trusts, and estates. Limited is mistaken. 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. *See, e.g.*, 84 FR No. 12 at 29332 (identifying potential filers for Paperwork Reduction Act purposes by Form 5471 filers by income tax return, including Form 1041 and Form 1065).

Limited resorts to GILTI data for 2021 to show that 36 percent of all corporate U.S. shareholders (again, for tax year 2021) held less than $5 million in assets. D.E. 50-1 at 44; D.E. 50-2 at 1 (Limited's Exhibit A-1). To start, that actual data – from GILTI-specific filings on Form 8992 – was not available when Treasury was developing and finalizing its § 951A regulations and making its reasonable projections about whether the regulations would have a significant economic impact on a substantial number of small entities. Even if it had been, and even if it shows a substantial number of small entities was affected by the regulations, there would have to be a significant economic effect. Using the data shown in Limited's Exhibit A-1, the class of filers highlighted amounts to 36% of corporate filers but only 0.2% of the GILTI tax reported.

Limited next tries to invoke statistics from the Final Rule itself to argue that Treasury ignored key data. Specifically, Limited points to the discussion of domestic partnerships, trusts, and estates. Contrary to Limited's argument, the presence of these discussions and statistics in the regulations makes clear that they were considered by the Treasury Department and the IRS. But Limited also sometimes misstates the data, and often fails to consider its limitations. At times, Limited mistakenly says the regulation refers to "2,000,000 *partnerships*" that could be subject to the regulation, but elsewhere Limited correctly refers to there being potentially up to 2,000,000 *partners* affected. [8] But Limited 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. Additionally, Limited frequently cites a $10B number for trust compliance. But, as the preamble to the Final Rule makes clear, that is the burden estimate for *all* reporting required by trusts (e.g., the Form 1041 burden) and is not specific or limited to Form 5471 or GILTI. In short, Limited tries to claim that small entities

[8] The preamble indicates 7,000 partnerships, not 2,000,000.

were not considered while using as evidence an extensive discussion of small entities.

Limited repeatedly focuses on the text immediately surrounding the § 605(b) certification to claim that Treasury failed to consider the impacts on small entities. One merely need to examine the preamble, which discusses the economic impact of the regulations compared to a no-rule baseline, to see the evidence that small entities were considered when making the certification. Limited's focus on the location of the language elevates form over substance and ignores the data that Treasury actually considered.

In the Final Rule, Treasury reasonably concluded the challenged regulations would not have a significant economic impact on a substantial number of directly regulated small entities. 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. Treasury also explained that U.S. shareholders—of all sizes—overall benefit from the regulations, which clarify potentially ambiguous statutory provisions, thereby significantly decreasing total costs of compliance. Additionally, Treasury reasonably addressed the only RFA-specific comment it received. Treasury's § 605(b) certification is thus reasonable and reasonably explained, particularly under the "highly deferential" standard of review.

CONCLUSION

Limited cannot support its conclusory standing allegations, state a claim as a matter of law under the Regulatory Flexibility Act, or succeed on the merits. The Court should deny Limited's motion for summary judgment and enter summary judgment for the Government.

Dated: June 15, 2026

Respectfully submitted,

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