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 SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. 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") challenges those regulations under the Regulatory Flexibility Act, contending Treasury inadequately supported its conclusion that the regulations would not have a significant economic impact on a substantial number of small entities. The Government moves for summary judgment because Limited 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.

II. Background.

In the 2017 Tax Cuts and Jobs Act ("TCJA"), Congress significantly changed the taxation of foreign income. *See* Pub. L. No. 115-97, §§ 14101-14502, 131 Stat. 2054, 2189-2235. Among those changes, Congress enacted 26 U.S.C. § 951A, which, as originally enacted, defined the "global intangible low-taxed income" ("GILTI") of U.S. shareholders of "controlled foreign corporations" ("CFCs").[1]

[1] Section 951(b) defines United States shareholder for purposes of Title 26 as a United States person who owns (or is considered to own) 10 percent or more of the total combined voting power of all classes of stock entitled to vote (or 10 percent or more of the total value of shares of all classes of stock) of a foreign corporation. 26 U.S.C. § 951(b); *see also* 26 U.S.C. §§ 957(c) ("U.S. person"); 958(a) ("owned"); 958(b) ("considered as being owned"). Section 957(a) defines CFC. 26 U.S.C. § 957(a).

As a general matter, prior to the TCJA (and outside of subpart F),[2] U.S. taxpayers holding shares in foreign corporations were not subject to U.S. income tax on the income of those corporations until the earnings were distributed to them as dividends or the taxpayers' shares in the corporation were sold. *See Moore v. United States*, 36 F.4th 930, 933 (9th Cir. 2022), *aff'd*, 602 U.S. 572 (2024). The TCJA "transformed U.S. corporate taxation from a worldwide system . . . toward a territorial system." *Id.* The TCJA largely eliminated tax deferral by taxing U.S. shareholders currently on all foreign earnings, except for certain limited categories of income. *See* Christopher H. Hanna & Cody A. Wilson, *U.S. International Tax Policy and Corporate America*, 48 J. Corp. L. 261, 267 (2023).

As part of that shift, § 951A required a U.S. shareholder of a CFC to annually include GILTI in its current gross income, regardless of whether the shareholder received the income. To take the simplest example, to calculate GILTI, a shareholder of a single CFC started with its pro rata share of its CFC's total income (excluding certain amounts already taxed and subtracting certain deductions), then subtracted its pro rata share of an amount tied to the CFC's tangible assets (because GILTI aimed to tax income derived from intangible property, specifically). The remainder represented the U.S. shareholder's GILTI inclusion.

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[2] "Subpart F," named for its placement in the Code, refers to a set of laws enacted in 1962 to restrict tax deferral on a portion of foreign income. *See* 26 U.S.C. § 951 *et seq*. Subpart F taxes U.S. shareholders on certain CFC earnings (primarily passive income, such as interest), even if those earnings are not actually distributed to the U.S. shareholder. 26 U.S.C. § 951(a).

That is no longer true. As the Court previously observed, *Silver v. IRS*, 2025 WL 2926379, at *2 n.2 (D.D.C. Oct. 15, 2025) ("*Silver II*"), Congress amended § 951A as part of the reconciliation bill known as the One Big Beautiful Bill Act ("OBBBA"), Pub. L. No. 119-21, § 70323, 139 Stat. 27, 205–06 (2025). Those amendments became effective on January 1, 2026. *Id.* As a result of the amendments, "GILTI," as it was known, no longer exists. Section 951A now requires a U.S. shareholder of a CFC to calculate its "NCTI"—net CFC tested income. 26 U.S.C. § 951A(a).[3] A U.S. shareholder of one or more CFCs must calculate its NCTI inclusion annually and include that amount in its gross income. *Id.*

The shift from GILTI to NCTI represents a dramatic simplification. Before the change, GILTI required three separate calculations, each requiring multiple steps of analysis. (GILTI = NCTI – (10% x QBAI – Interest Expense)). After the change, only NCTI remains. (~~GILTI~~ = NCTI – ~~(10% x QBAI – Interest Expense)~~). *See generally* OBBBA § 70323. In removing the "QBAI" (qualified business asset investment) and "Interest Expense," (which, together, aimed to approximate a deemed return on tangible assets), Congress gave up its effort to tax income derived from intangible assets, specifically. Now, with the combination of the streamlined NCTI (26 U.S.C. § 951A) and pre-existing subpart F income (26 U.S.C. § 951), U.S. shareholders of CFCs are generally subject to current taxation on most net income earned through a CFC.

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[3] All citations to § 951A in this brief refer to the current version of the statute, which became effective on January 1, 2026.

Treasury promulgated the challenged regulations under the GILTI version of § 951A.[4] As a result of the amendments, several provisions of the challenged regulations are now obsolete. A U.S. shareholder no longer must calculate its QBAI, which means, going forward, it is no longer required to calculate adjusted basis of tangible property used in its CFC's trade or business. Thus, most of 26 C.F.R. § 1.951A-3 is obsolete. As is 26 C.F.R. § 1.951A-4, as U.S. shareholders are no longer required to calculate interest income attributable to currently deductible interest expense that is allocable to gross tested income.

But many of the regulations remain effective for the NCTI version of § 951A. While the statutory amendments excised the back half of the GILTI calculation, the rules to calculate NCTI did not change. Thus, all regulations aimed at the NCTI calculation remain in force. To calculate the NCTI inclusion, a U.S. shareholder still starts with each of its CFCs' gross income, excludes several categories of otherwise taxed (or excluded) income, then subtracts deductions properly allocable to its CFC's income (including taxes). 26 U.S.C. § 951A(b)(2); 26 C.F.R. § 1.951A-2(c). If the result is positive, the CFC has tested income; if negative, the CFC has tested loss. *Id.* The U.S. shareholder then takes its pro rata share of that tested income or tested loss and nets it with the tested income or loss (calculated the same way) of all

[4] *See* Guidance Related to Section 951A (Global Intangible Low-Taxed Income), 83 Fed. Reg. 51,072 (proposed Oct. 10, 2018) (to be codified at 26 C.F.R. pt. 1) (hereinafter "NPRM") (AR 145–184); Guidance Related to Section 951A (Global Intangible Low-Taxed Income) and Certain Guidance Related to Foreign Tax Credits, 84 Fed. Reg. 29,288 (June 21, 2019) (codified at 26 C.F.R. pt. 1) (hereinafter "Final Rule") (AR 21–103).

other CFCs of which it is a U.S. shareholder. 26 U.S.C. § 951A(b)(1), (c); 26 C.F.R. § 1.951A-2(c). If that number is positive, it represents the U.S. shareholder's net CFC tested income (NCTI), and the shareholder includes the amount in its gross income. 26 U.S.C. § 951A(a)–(b). If the net figure is negative, the U.S. shareholder has no NCTI to include. *Cf. id.*

As part of its comprehensive rulemaking (under the GILTI version of § 951A), Treasury considered the potential impact of its regulations on small businesses that qualify as U.S. shareholders for purposes of § 951A and the regulations. Treasury determined the regulations would not have a significant economic impact on a substantial number of directly regulated small entities and therefore included a certification to that effect under 5 U.S.C. § 605(b). NPRM at 51,087; Final Rule at 29,333. Limited—the only Plaintiff remaining after the Court's ruling on the Government's motion to dismiss, *Silver II*, 2025 WL 2926379, at *6—challenges that certification in this suit.

Limited is a controlled foreign corporation ("CFC") for purposes of § 951A and the challenged regulations. D.E. 33 ¶ 4. It is wholly owned by one U.S. shareholder, who is a natural person. *Id.* As a U.S. shareholder of a CFC, Limited's U.S. shareholder must annually compute NCTI (and was previously required to compute GILTI) and, if the amount is positive, include it in his gross income. 26 U.S.C. § 951A. Limited's U.S. shareholder must also file two annual information returns (Forms 8992 and 5471 Schedule I-1), which reflect the figures that went into his NCTI calculation. D.E. 33 ¶¶ 38–41.

Limited argues Treasury erred in certifying under 5 U.S.C. § 605(b) that the regulations would not have a significant economic impact on a substantial number of small entities. D.E. 33 ¶¶ 57–58, 61. It seeks remand of the regulations to Treasury to perform a regulatory flexibility analysis. D.E. 33 at 28 ¶ 1.

III. Argument.

Limited's challenge fails for three reasons. First, Limited lacks standing because it cannot establish—with the degree of proof required to survive summary judgment—that whatever injury it incurs is caused by the regulations and redressable by the relief it seeks. Second, Limited's Regulatory Flexibility Act claim fails as a matter of law because, as an *indirectly* related entity, Limited is not within the zone of interests the Act aims to protect. And third, Limited's challenge fails on its merits because Treasury's § 605(b) certification was reasonable and reasonably explained. On any of these bases the Court should reject Limited's challenge and grant summary judgment to the Government.

A. Limited lacks Article III standing.

To start, Limited cannot establish Article III standing. To establish Article III standing, a plaintiff must plead (and ultimately prove) an "injury in fact" that is "fairly traceable to the challenged action of the defendant" which is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citation modified). Plaintiffs must "demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431

(2021). "Standing under Article III is jurisdictional." *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 174 (D.C. Cir. 2012).

Limited does not challenge the substance of the regulations, only the process by which they were promulgated. Specifically, Limited alleges it was injured by Treasury's decision to issue a § 605(b) certification, rather than conduct a full regulatory flexibility analysis. D.E. 33 ¶ 57. And had Treasury conducted the full analysis, Limited says, Treasury may have issued different regulations, which may have lessened the compliance burden on Limited and others similarly situated. *Cf.* D.E. 33 ¶ 58. Limited thus rests its standing on a procedural injury. *Cf. Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 182 (D.C. Cir. 2017).

In a case alleging a procedural injury, courts "relax the redressability and imminence requirements" of standing. *Id.* But "the injury in fact requirement is a hard floor of Article III jurisdiction that cannot be altered by statute." *Id.* at 183. A plaintiff must prove a concrete injury, "even in the context of a statutory violation." *TransUnion LLC*, 594 U.S. at 426. And the plaintiff must still show "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*, 861 F.3d at 183 (quoting *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc)). Thus, while a "plaintiff in a procedural-injury case is relieved of having to show that proper procedures would have caused the agency to take a different substantive action, the plaintiff must still show that the agency action was the cause of some redressable injury to the plaintiff." *Renal Physicians Ass'n v. U.S. Dep't of Health & Hum. Servs.*, 489 F.3d 1267, 1279 (D.C. Cir. 2007).

1. Limited makes only conclusory allegations, which no longer suffice at summary judgment.

It is Limited's burden to establish both that the regulations have a causal connection to its alleged compliance cost injury and that an order from the Court could possibly decrease its compliance costs and remedy that injury. *See Ctr. for Biological Diversity*, 861 F.3d at 183. Limited must support each element "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Though the Court held Limited alleged the general facts necessary to survive the Government's motion to dismiss, *Silver II*, 2025 WL 2926379, at *6, "at summary judgment a court will not presume the missing facts necessary to establish an element of standing," *Silver v. IRS*, 531 F. Supp. 3d 346, 361 (D.D.C. 2021) ("*Silver I*"). Thus, those "conclusory allegations" will no longer suffice. *Id.*

As explained, Limited describes its injury-in-fact as an economic, compliance cost injury. Limited generally alleges it "has incurred and continues to incur substantial costs each year to prepare the information that is necessary for its sole shareholder . . . to calculate his U.S. income tax liability under the GILTI statute and regulations." *Silver II*, 2025 WL 2926379, at *3. Limited claims it "holds some of the information that [its U.S. shareholder] needs to compile to comply with his tax obligations." *Id.* at *6. And it suggests it must "incur costs to understand [its

U.S. shareholder's] obligations and compile the necessary information." *Id.* At the pleadings stage, the Court accepted as true Limited's allegation that those costs are "fairly traceable" to the challenged regulations. *Id.* And it accepted as plausible Limited's general contention that additional guidance—which could result from a regulatory flexibility analysis—could conceivably reduce Limited's compliance costs. *Id.*

But to survive summary judgment, Limited must specifically explain the compliance cost it incurs because of the challenged regulations that it would not incur in their absence. *See, e.g.*, *Silver I*, 531 F. Supp. 3d at 360–61 (rejecting insufficiently specific standing allegations on summary judgment after finding similar allegations sufficient to survive a motion to dismiss), *aff'd*, *Silver v. IRS*, 2022 WL 17420308, at *2 (D.C. Cir. Dec. 6, 2022) (affirming dismissal because "the plaintiffs *have not explained how those costs are traceable to transition tax regulations*—as opposed to the transition tax statute, other provisions of the Internal Revenue Code, other tax regulations besides the ones challenged here, or other sources of law such as tax treaties" (emphasis added)). And Limited must explain how a remand from this Court to Treasury with instructions to perform a regulatory flexibility analysis could possibly remedy the compliance costs it claims to incur. Limited cannot make either showing because nothing in the challenged regulations compels Limited to take any action or incur any cost. And nothing in the statute—as it applies to Limited—requires further explanation from Treasury, such that additional guidance could conceivably lower Limited's compliance costs.

2. Limited cannot show an injury caused by the challenged regulations.

Limited alleges it incurs costs to collect and prepare the information at the CFC level necessary for its U.S. shareholder to calculate and report his § 951A inclusion. *Silver II*, 2025 WL 2926379, at *3. And it contends those compliance costs are fairly traceable to the challenged regulations—specifically to Treasury's decision to make a § 605(b) certification rather than perform a regulatory flexibility analysis. *Cf. id.* at *6. Its theory suffers three flaws, each equally fatal.

First, if Limited opts to participate in the calculation of its U.S. shareholder's § 951A inclusion—or the preparation or submission of its U.S. shareholder's information reports (which are further addressed below)—any expense is voluntarily incurred. *E.g.*, *Grocery Mfrs.*, 693 F.3d at 177–78. The statute imposes an obligation on *U.S. shareholders* to calculate § 951A inclusions, and the regulations impose an obligation on *U.S. shareholders* to report the numbers making up such inclusions. *Silver II*, 2025 WL 2926379, at *7 ("Although a foreign corporation like Plaintiff Limited may assist its shareholder in complying with the GILTI regulations, there is no direct requirement that it do so.").

Limited emphasizes it holds some information necessary for its U.S. shareholder to comply with those obligations. *Id.* at *3. Even if the Court construed the statute to implicitly create an information-sharing obligation on the CFC (which it does not), it would not follow that such obligation would require the CFC to incur expense. In that circumstance, the CFC would discharge whatever information-sharing duty the statute could be read to create by passively allowing access by the

U.S. shareholder to its books and records. The CFC *need* incur no expense. 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. But that would be the CFC's voluntary choice, not a requirement of the statute.[5] *Cf. Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 456–57 (6th Cir. 2017) (rejecting standing where harm arose from third party's "voluntary choice to go *above and beyond*" the requirements of the challenged statute (emphasis in original)); *Grocery Mfrs.*, 693 F.3d at 178 (no causation where injury caused by choices made by plaintiffs "in their own self-interest").

Second, as the Government has previously explained, the obligation for Limited's U.S. shareholder to calculate NCTI (and, previously, GILTI) comes from § 951A, not the challenged regulations. D.E. 36-1 at 15–16 (ECF pagination). So even if the costs Limited alleges it incurs were somehow involuntary, the cause of them would be the statute, not the regulations. (And certainly not the § 605(b) certification). At summary judgment, Limited's conclusory allegations to the contrary can no longer suffice. Limited has not identified any *specific* information it must gather or calculation its U.S. shareholder must perform *under a provision of*

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[5] *See* Oral Argument at 4:10, *Silver v. IRS*, 2024 WL 1697436 (D.C. Cir. 2024) ("*Silver II* Appeal"), https://perma.cc/PGM7-6XJV ("Is the company obligated to provide this information to the IRS? I get that Mr. Silver is."); *Id.* at 4:50 ("What happens to the company if it doesn't provide the information? The IRS has no jurisdiction over it. It can't sanction it. It can't do anything to it."); *Id.* at 5:10 ("It's done that [incurred costs] because it's helping out Mr. Silver . . . If this company chooses to do this paperwork to support Mr. Silver's needs, that's a choice.").

the regulations that is not independently required under the statute. Nor has Limited identified confusion or unworkability caused by the regulations, specifically, rather than the statute. In fact, Limited has not even articulated what specific confusion it encounters with the statute that alternate regulations (theoretically issued after a regulatory flexibility analysis) could conceivably remedy. The statute creates the obligation on U.S. shareholders to calculate NCTI and include NCTI in gross income. To the extent Limited incurs costs to assist its U.S. shareholder in satisfying those obligations, they are traceable to the statute. Limited cannot show—with the degree of specificity required at summary judgment—that it is "substantially probable" that the regulations, rather than the statute, caused its injury. *See Grocery Mfrs.*, 693 F.3d at 175–76.

Third, unlike for Limited's U.S. shareholder, the challenged regulations do not create a new disclosure obligation for Limited. As the Government previously acknowledged, while the statute creates the obligation for a U.S. shareholder of a CFC to calculate his NCTI and include it in his gross income, the regulations create the obligation for such shareholder to prepare and submit Forms 8992 and 5471 Schedule I-1. NPRM at 51,084; D.E. 36-1 at 17 (ECF pagination). But the regulations do *not* create any similar disclosure obligation for the CFC. D.E. 36-1 at 17 n.4 (ECF pagination). Thus, even assuming (but not conceding) that the regulations require U.S. shareholders to incur a cost beyond those necessary to comply with the statute, the same cannot be said for CFCs.

And the forms required of Limited's U.S. shareholder do not plausibly require *Limited* to incur *new* costs. For one, as is true with information necessary to calculate the § 951A inclusion, if Limited actively produces information, rather than passively allowing its U.S. shareholder access to it, the costs to do so would be voluntarily incurred. But even under Limited's theory, preexisting, unchallenged statutory and regulatory requirements already effectively "require" a CFC to maintain all information reported on Forms 8992 and 5471 Schedule I-1, because it is all information necessary for the CFC's U.S. shareholder to comply with various (unchallenged) provisions of the Code.[6] For instance, under 26 C.F.R. § 1.6038, Limited's U.S. shareholder must currently report: (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). Under Limited's theory—whereby information needed by a U.S. shareholder is effectively required to be compiled by its CFC—Limited necessarily maintains each of those items under some combination of 26 U.S.C. §§ 951, 952, 964, 6001, 6038 and

[6] As explained above, Congress simplified § 951A since Treasury created the existing Forms 8992 and 5471 Schedule I-1. As of this writing, both forms require information no longer necessary to calculate a person's NCTI inclusion. It is foreseeable that Treasury may alter the forms in line with the statutory amendments, which only makes it less plausible that Limited will incur costs to compile information it does not already maintain.

associated regulations. If Limited contends the challenged regulations cause it to compile and make available information it would not otherwise maintain, it must identify that information with specificity.

3. Limited cannot show its injury could be redressed by its requested relief.

Relatedly, (but independently), Limited cannot show that the relief it seeks in this action could possibly remedy whatever compliance cost it claims the regulations impose. Limited's central thesis is that Treasury should have done a comprehensive regulatory flexibility analysis because, if it had, it would have recognized the undue burden on small businesses created by the § 951A regime and altered the regulations (or, somehow, the statutory requirements) to lessen the burdens on those small businesses. D.E. 33 ¶ 58. But Limited's theory fails to explain how different guidance aimed at small business U.S. shareholders could plausibly redress the cost *it* allegedly incurs to assist *its* U.S. shareholder (which is not a small business). While the redressability requirement is relaxed in cases alleging a procedural injury, it is not eliminated. *See California v. Trump*, 613 F. Supp. 3d 231, 242–44 (D.D.C. 2020) ("Although the plaintiff in a procedural-injury case need not show that the agency would have reached a different decision in the absence of the alleged procedural violation, the plaintiff must establish some causal connection between the omitted procedural step and the substantive government decision at issue."). Limited must specifically articulate how a regulatory flexibility analysis could *possibly* cause Treasury to alter the regulations in a way that would lower Limited's compliance costs.

Congress's efforts to currently tax foreign-based income have placed concededly complex compliance obligations on some taxpayers. This was particularly true pre-amendments, when Congress sought to distinguish between income derived from tangible property and income derived from intangible property. But current § 951A is not confusing for an entity like Limited—a CFC with one class of stock wholly owned by one natural person.

Under current § 951A, Limited's U.S. shareholder must: (1) determine Limited's gross taxable income; (2) exclude statutorily defined foreign income (which, to the extent Limited earns such income, must already be calculated under the relevant statutes); then (3) subtract deductions properly allocable to that income. 26 U.S.C. § 951A(b)(2)(A). If the result is positive, Limited has tested income. *Id.* If the result is negative, Limited has tested loss. 26 U.S.C. § 951A(b)(2)(B). Because Limited is wholly owned by its one U.S. shareholder, its U.S. shareholder's pro rata share of that income or loss is 100%. *See* 26 U.S.C. §§ 951A(c)(1); 951(a)(2). And because Limited is its U.S. shareholder's sole CFC, the net CFC tested income (NCTI) inclusion for Limited's U.S. shareholder is equal to the tested income (if positive) or $0 (if Limited has a tested loss). 26 U.S.C. § 951A(b)(1). Limited's U.S. shareholder then includes that amount as gross income on his individual income tax return.[7] 26 U.S.C. § 951A(a). The analysis required of

[7] An individual taxpayer who is a U.S. shareholder of a CFC may choose to make an (annual) election under 26 U.S.C. § 962 to obtain certain current tax benefits with respect to income inclusions under 26 U.S.C. §§ 951(a) and 951A. Limited's U.S.

(continued...)

Limited's U.S. shareholder can be identified, explained, and understood by simply reading the statute.

For each step in the § 951A analysis, as relevant to an entity like Limited, the regulations simply repeat and apply the instructions from the statute. *E.g.*, 26 C.F.R. § 1.951A-2(c)(1) (gross income after exclusions); 26 C.F.R. § 1.951A-2(c)(2) (properly allocable deductions); 26 C.F.R. §§ 1.951A-1(c)(2); 1.951A-2(b) (netting); 26 C.F.R. §§ 1.951A-1(d)(1)–(2); 1.951A-5(b)(2) (pro rata share); 26 C.F.R. § 1.951-1(b)(2)(ii) (pro rata share of one U.S. shareholder owning 100% of CFC stock).

When the Government acknowledges aspects of § 951A remain complicated, it does not refer to entities like Limited. The analysis complicates when a CFC has multiple shareholders with ownership interests that vary over the course of the taxable year, for example. *See* 26 C.F.R. § 1.951-1(b)(2)(iv). Or if the CFC has more than one class of stock. *See* 26 C.F.R. §§ 1.951A-1(d)(4)(iv); 1.951-1(e)(7)(vii), (viii). The statute says a CFC's gross income should be determined without regard to subpart F income, but does not address treatment of amounts excluded under the earnings and profits limitation in 26 U.S.C. § 952(c). *See* 26 C.F.R. § 1.951A-2(c)(4)(iii)(B). And the regulations include special rules regarding the treatment of

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shareholder indicated he has made such election in the past. *See* D.E. 36-1 at 26–27 (ECF pagination). This election can cause the taxpayer to have to make more complicated calculations in current and future years, particularly in future years with a distribution from the CFC to the individual. But that complexity derives from the rules with respect to the § 962 election, as well as other rules with respect to distributions or the other later tax effects, none of which are the subject of the regulations at issue.

domestic partnerships, because the statute fails to address whether NCTI should be calculated at the level of a partnership or its partners. *See* NPRM at 51,079, 51,085; 26 C.F.R. § 1.951A-1(e). In other words, there are fact patterns for which the text of § 951A (and pre-951A regulations) do not provide clear answers (which is why, in many cases, the challenged regulations are both necessary and helpful), but the arrangement between Limited and its single U.S. shareholder is not among them.

Relatedly, whatever burden Limited claims the regulations impose, a regulatory flexibility analysis would not possibly fix. Were Treasury to perform a regulatory flexibility analysis, it would not consider the impact of the regulations on Limited. As explained below, if Treasury were required to perform such analysis, it would consider the economic impact on small domestic partnerships and corporations that own at least a 10% interest in one or more CFCs—the small entities directly regulated by the regulations.

If, as a result of that analysis, Treasury made further efforts to clarify the rules for small domestic partnerships and corporations, those changes would not alter the straightforward application of the statutory terms to Limited—a CFC with one class of stock fully owned by a single U.S. shareholder. If Limited contends otherwise, it must specifically and plausibly explain how remand of the regulations could possibly remedy its compliance cost injury. *Cf. Johnson v. Becerra*, 111 F.4th 1237, 1246–47 (D.C. Cir. 2024) (finding no redressability in part because the plaintiffs requested "woefully underspecified" relief and failed to "identify what reforms are necessary to fix the problem").

B. Limited's Regulatory Flexibility Act claim fails as a matter of law.

Even if Limited could establish Article III standing, its claim would still fail as a matter of law. All agree that a Regulatory Flexibility Act claim is only available to a "small entity" that is "adversely affected or aggrieved" by the challenged agency action. 5 U.S.C. § 611(a). Limited claims it is injured by the challenged regulations, but it is not directly regulated by them. Because the Regulatory Flexibility Act extends only to directly regulated entities, Limited's claim fails as a matter of law.

This Court previously held that Limited plausibly alleged it was a small entity adversely affected by the regulations "[f]or essentially the same reasons" it plausibly alleged Article III standing. *Silver II*, 2025 WL 2926379, at *8. That holding should not be treated as law of the case because it was clearly erroneous. *See Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 697–98 D.C. Cir. 2022); e.*g.*, *US Citrus Sci. Council v. U.S. Dep't of Agric.*, 312 F. Supp. 3d 884, 910–12 (E.D. Cal. 2018) (reversing similar RFA holding, relying in part on D.C. Circuit precedent).

The Government maintains only directly regulated small entities can state a claim under the Regulatory Flexibility Act. But that rule derives not from "small entity" as the Court and Judge Mehta appear to have assumed.[8] *Silver II*, 2025 WL 2926379, at *7–8; *Silver v. IRS*, 569 F. Supp. 3d 5, 12 (D.D.C. 2021) ("*Silver I*

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[8] The Government apologizes for its failure to cite Judge Mehta's *Silver I* opinion on reconsideration in its previous briefing. The failure was an accidental oversight, not a knowing omission.

Reconsideration"). It comes from "adversely affected or aggrieved." *Cf. Silver I* Reconsideration, 569 F. Supp. 3d at 12 n.1 (noting that the Government failed to articulate the argument on those terms in *Silver I*).

"'Adversely affected' (and its variations like 'adversely affected or aggrieved') is a term of art with a 'long history in federal administrative law.'" *FDA v. R. J. Reynolds Vapor Co.*, 606 U.S. 226, 232 (2025). It carries with it a "zone of interests" test, which is "not especially demanding" but is also "*no[t] so broad as to encompass every person with Article III standing*." *Id.* at 233–34 (emphasis added). "To invoke a statutory cause of action, a plaintiff must be within the 'zone of interests' that the statute protects." *Id.* at 232. 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 (emphasis added).

Thus, it is the "zone of interests" test that layers "the substantive analysis that agencies must perform under the Regulatory Flexibility Act" on top of "the Act's judicial review provisions." *Cf. Silver II*, 2025 WL 2926379, at *7 (emphasis removed). And the Regulatory Flexibility Act requires agencies to consider only the burdens on small entities "subject to" a regulation or to whom a regulation "will apply." *Id.* Circuit precedent 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). It follows that indirectly regulated entities are not within the Act's "zone of interests" and thus cannot state a claim under 5 U.S.C. § 611(a). *See White Eagle Co-Op. Ass'n v. Conner*, 553 F.3d 467, 480 (7th Cir.

2009) ("The rule that emerges [from D.C. Circuit precedent] is that small entities directly regulated by the proposed statute—whose conduct is circumscribed or mandated—may bring a challenge to the RFA analysis or certification of an agency . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.").

As this Court already explained, Limited is not "directly affected" or "regulated by" the challenged regulations. *Silver II*, 2025 WL 2926379, at *7. 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, the CFC risks no direct penalty. *Id.* As a practical matter, the CFC may incur costs to assist in information gathering and calculations (despite no regulatory mandate to participate). *Id.* But the regulations are aimed at—and impose *direct* obligations on—U.S. shareholders, not their CFCs. *Compare Cement Kiln Recycling Coal.*, 255 F.3d at 869 (where EPA rule applied "by its terms" only to HWCs, only HWCs covered by the RFA, even though the rule resulted in increased costs to others), *with Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161, 177 (D.C. Cir. 2007) (FAA rule applied to more parties where the rule "impose[d] responsibilities directly on [those additional parties]").

Treasury was not required to consider Limited's interests under the Regulatory Flexibility Act. It follows that Limited is not within the zone of interests the Act aims to protect. Thus, Limited is not "adversely affected or aggrieved" under

5 U.S.C. § 611(a). Limited thus cannot state a claim under the Regulatory Flexibility Act, which means the claim fails as a matter of law.

C. The Government is entitled to summary judgment on the merits.

Finally, even if the Court reaches the merits, Limited cannot succeed. Treasury complied with the procedural requirements of the Act, judicial review under the Regulatory Flexibility Act is extremely deferential, and Treasury's explanations are reasonable.

1. Treasury complied with the procedures of the Regulatory Flexibility Act by making a § 605(b) certification.

The Regulatory Flexibility Act generally requires administrative agencies to consider the impact a proposed rule will have on small entities. *See* 5 U.S.C. §§ 601–12. The D.C. Circuit has clarified that an agency need only consider the impact of the rule on *directly regulated* small entities. *See Aeronautical Repair Station Ass'n*, 494 F.3d at 176–77; *Cement Kiln Recycling Coal*, 255 F.3d at 869.

The Regulatory Flexibility Act generally features twice in an agency's rulemaking process. *Sw. Pa. Growth All. v. Browner*, 121 F.3d 106, 118 (3d Cir. 1997). At each of those two points, "an agency must prepare a regulatory flexibility analysis, which is an assessment of the proposed rule's effects on [directly regulated] small entities." *Id.* If the agency is "required by law to publish a proposed rule," the agency generally must prepare and include an initial regulatory flexibility analysis. 5 U.S.C. § 603. And when the agency promulgates the final rule, it generally must prepare a final regulatory flexibility analysis. 5 U.S.C. § 604.

But the Regulatory Flexibility Act exempts agencies from the requirement to perform either analysis if the agency "certifies that the rule will not have a significant economic impact on a substantial number of small entities." *Associated Builders & Contractors v. Shiu*, 30 F. Supp. 3d 25, 46 (D.D.C. 2014) (quoting 5 U.S.C. § 605(b)); *cf. Mid-Tex Elec. Co-Op., Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (clarifying that an agency "may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities *that are subject to the requirements of the rule*" (emphasis added)). The no-significant-impact finding is commonly referred to as a "§ 605(b) certification." The certification must be accompanied by a statement providing its factual basis. 5 U.S.C. § 605(b). And the agency must provide the certification and statement to the Chief Counsel for Advocacy of the Small Business Administration. *Id.*

In both the NPRM and the Final Rule, Treasury certified that the challenged regulations would not have a significant economic impact on a substantial number of small entities. *See* NPRM at 51,087; Final Rule at 29,333. Treasury included a factual basis for its determination, explaining that small businesses are unlikely to be U.S. shareholders of CFCs (and thus unlikely to be directly subject to the regulations). *Id.* And Treasury submitted the certification and statement to the Chief Counsel for Advocacy of the Small Business Administration. *Id.* at 29,334. Treasury thus complied with the procedural requirements of the Regulatory Flexibility Act.

2. Treasury's § 605(b) certification is reasonable.

Limited appears to challenge the reasonableness of Treasury's § 605(b) certification. *Cf.* D.E. 33 ¶ 58. It contends Treasury failed to "research[] and analyze[] the empirical data,"—seemingly, data reflecting the number of small domestic businesses that own controlled foreign corporations—and implies that such data undermine Treasury's certification. *Id.* And it suggests that a full regulatory flexibility analysis would have required Treasury to consider the "needs and concerns of small businesses," like Limited, and that had those concerns been considered, Treasury would have crafted more "realistic" regulations. *Id.*

The Regulatory Flexibility Act allows limited judicial review of Treasury's § 605(b) certification. But the Regulatory Flexibility Act's requirements are "purely procedural," which generally means that as long as the agency follows the proper procedure, "it complies with the Act." *Nat'l Tel. Co-Op. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009). A court "cannot find an agency violated the RFA merely because it disagrees" with the agency's "substantive determinations." *Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d 23, 67 (D.D.C. 2017).

A § 605(b) certification is reviewed in accordance with the judicial review provisions of the APA, which are "highly deferential, particularly with regard to an agency's predictive judgments about the likely economic effects of a rule." *Associated Builders & Contractors*, 30 F. Supp. 3d at 46–47 (quoting *Helicopter Ass'n Int'l v. FAA*, 722 F.3d 430, 438 (D.C. Cir. 2013)) (citation modified). "Ultimately, if an agency makes a reasonable, good-faith effort to carry out the Regulatory Flexibility Act's mandate, then its decision will stand." *Id.* at 47 (citation modified).

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, so the Government is entitled to summary judgment.

i. Treasury supported its § 605(b) certification with a reasonable explanation.

Treasury first identified the small entities directly regulated by the challenged regulations. NPRM at 51,087; Final Rule at 29,333. Treasury explained that the regulations, like the statute, apply to U.S. shareholders of CFCs. Final Rule at 29,333. It then clarified that not all U.S. shareholders are "small entities" under the Regulatory Flexibility Act; Treasury observed that U.S. shareholders are not "considered small entities to the extent the taxpayers are natural persons or entities other than small entities." *Id.* Thus, the small entities directly regulated by the challenged regulations are "domestic small entities,"—in other words, small domestic corporations and partnerships—"that are U.S. shareholders of one or more CFCs."[9] *Id.*

In the section of the Final Rule titled "Regulatory Flexibility Act," Treasury projected that the total number of *small* domestic partnerships and corporations qualifying as U.S. shareholders was likely to be insubstantial. Final Rule at 29,333. As Treasury explained, "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." *Id.* Treasury acknowledged that it lacks data separating Form 5471 filers by size or corporate structure. *Id.*; *see also* NPRM at 51,087 n.2 (specifically requesting "comments on the number of small businesses that are likely to file Schedule I-1"). But the APA does not require Treasury to work with perfect data. *See FCC v. Prometheus Radio Project*, 592 U.S. 414, 425–27 (2021). It is sufficient for the agency to "acknowledge[] the gaps in the data," "ask[] for data on the issue," and, if nothing better is uncovered, "rel[y] on the data it ha[s]." *Id.* at 425.

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. Final Rule at 29,333. Treasury also cited figures from

[9] Because Limited is not a U.S. shareholder and only U.S. shareholders are directly regulated by the challenged regulations, it is immaterial whether Limited could satisfy the relevant definition of "small entity" for purposes of § 611(a)(1). *Cf. Silver II*, 2025 WL 2926379, at *8 (observing disagreement between the parties as to the precise definition and declining to resolve it).

the Joint Committee on Taxation, which estimated the annual tax revenue to be collected under § 951A from businesses of all sizes to be "less than 0.3 percent of gross receipts." Final Rule at 29,333. In other words, § 951A (and the associated regulations) applies to a small subset of taxpayers and imposes a tax on those taxpayers generally equal to less than half a percent of those taxpayers' gross receipts. *Id.* So, even if the regulations were responsible for the full tax burden (which they are not) and all 30,000 U.S. shareholders were small businesses (which they are not), Treasury could still reasonably conclude that the regulations would not impose a *significant* burden on a *substantial* number of small entities.

This analysis is strengthened by Treasury's explanations at various other points in the rulemaking. *Cf. U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 642 (D.C. Cir. 2016) (explaining that courts should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned" and directing courts to consider other explanations in the challenged rule to the extent they offer helpful context to discern the agency's path). Treasury repeatedly noted that its regulations would *assist* small domestic corporations and small domestic partnerships, not burden them. *E.g.*, NPRM at 51,085–86; Final Rule at 29,324–26. When analyzing whether a rule will burden small entities, "the relevant economic impact is the impact of compliance." *Colorado ex rel. Colo. State Banking Bd. v. Resolution Trust Corp.*, 926 F. 2d 931, 948 (10th Cir. 1991). As Treasury explained, U.S. shareholders must calculate and pay tax due under 26 U.S.C. § 951A "regardless of the issuance of regulations or instructions." NPRM at 51,086. Treasury thus predicted that "the proposed regulations will *reduce* the costs for taxpayers to comply with [§ 951A], relative to the baseline of no promulgated regulations." *Id.* (emphasis added).

As noted above, *see supra* III.A.3, there are a few instances in which the regulations clarify or supplement the calculations required by the statute, and could thus, theoretically, impose different costs. But the net effect of the regulations is to significantly *decrease* compliance costs. *Cf.* NPRM at 51,086. For instance, the NPRM and Final Rule explain that for domestic partnerships qualifying as U.S. shareholders, which almost certainly comprise a portion of the relevant small business entities that own CFCs, NCTI could conceivably be calculated three ways under the text of § 951A—an entity approach (with NCTI calculated and owed at the partnership level), an aggregate approach (with the partnership disregarded and NCTI calculated and owed as if each partner owned the CFC stock directly), or a hybrid approach. NPRM at 51,079–80; Final Rule at 29,313–16.

No matter the approach Treasury adopted, any definitive answer would have significantly decreased the compliance costs for domestic partnerships (large or small). *Cf.* Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 Va. Tax. Rev. 645, 661 (2003) ("Tax advisers are especially hungry for certainty and guidance because their mistakes can be quite costly."). But Treasury ultimately adopted the aggregate approach—despite initially proposing a hybrid approach—after receiving comments that the aggregate approach would "reduce complexities" and produce the least uncertainty. Final Rule at 29,314.

Treasury's guidance significantly decreases compliance costs for domestic partnerships and corporations by clarifying statutory ambiguities, so Treasury reasonably concluded that small entities would incur less total compliance cost with the regulations than without them. Indeed, added certainty is particularly beneficial for small businesses, which may lack the capital to absorb risk that a position may be disallowed by the IRS (or the courts). And Treasury consistently adopted interpretations aimed at minimizing burdens on taxpayers and maximizing economic efficiency. *E.g.*, NPRM at 51,086 (explaining the regulations incorporate subpart F interpretations, wherever appropriate, because "rel[iance] on existing infrastructure . . . allow[s] taxpayers to use the same analysis that they already conduct for subpart F purposes"); Final Rule at 29,325 (discussing now obsolete rules for depreciating assets and attributing interest expense, which were adopted to "simplif[y] the taxpayers' computations and reduce[] their compliance costs"). Thus, to the extent the regulations alter or clarify the statutory requirements, the result is to decrease compliance costs for small businesses.

The decrease in compliance costs offered by the regulations' guidance provisions plainly offsets the increase in compliance costs created by the regulations' disclosure requirements. The offset is clear considering the substantial efficiency offered by the clarifying provisions on the one hand, and the de minimis burden imposed by Forms 8992 and 5471, Schedule I on the other. The forms are information returns that require U.S. shareholders of CFCs to identify the numbers comprising the U.S. shareholder's § 951A inclusion. To describe the forms is to explain why they do not impose substantial *new* compliance costs—the U.S. shareholder must determine every piece of information required by the forms to calculate NCTI under the statute. The regulations impose compliance costs on U.S. shareholders of CFCs insofar as they must annually fill out and submit two forms (using information already *necessarily* in their possession). But those costs are de minimis—even for small businesses—and they are plainly outweighed by the significant savings created by the certainty provided by many of the regulations' substantive provisions.

Thus, the net impact of the challenged regulations is to decrease compliance costs for small businesses, which means Treasury reasonably concluded the regulations would "reduce the costs for taxpayers to comply with [§ 951A], relative to the baseline of no promulgated regulations." NPRM at 51,086. Treasury's conclusion is particularly reasonable under the "highly deferential" standard applied to "an agency's predictive judgments about the likely economic effects of a rule." *Associated Builders & Contractors*, 30 F. Supp. 3d at 47. And, once determined to be reasonable, the conclusion provides all the explanation necessary for Treasury's § 605(b) certification to withstand judicial review. *Cf. Sargent v. Block*, 576 F. Supp. 882, 893 (D.D.C. 1983) (upholding concise § 605(b) explanation that the agency "anticipated no major increase in cost or prices for program participants"); *Sw. Pa. Growth All.*, 121 F.3d at 119, 123 (holding brief statement that the rule "does not affect any existing requirements applicable to small entities nor does it impose new requirements" sufficient to satisfy the requirements of 605(b)).

ii. Treasury reasonably addressed the only comment directed at its § 605(b) certification.

Finally, Treasury reasonably addressed the only RFA-specific comment it received.

In the NPRM, Treasury specifically invited comments on the potential impacts of the regulations on small-entity U.S. shareholders. NPRM at 51,088. Treasury also submitted the proposed regulations to the Chief Counsel for Advocacy of the Small Business Administration. *See* Final Rule at 29,334 (citing 26 U.S.C. § 7805(f)). Treasury received a single RFA-related comment, from Limited's U.S. shareholder. Final Rule at 29,333; AR at 526–562. Treasury received no other RFA-related comments from regulated entities, interested stakeholders, or the Chief Counsel for Advocacy of the Small Business Administration.

In its principal comment, Limited's U.S. shareholder claimed that "any regulations under 951A will have a significant impact on a very large number of small businesses." AR at 526–27. As support, the comment listed features of the *statute*, such as its ongoing, annual application and the significant information required from "small businesses AND their owners" to "attempt to comply with the 951A provisions." *Id.* at 527 (emphasis in original). 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 Limited's U.S. shareholder'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 simply implement statutory requirements, they have no economic impact at all. As explained above, 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.

The comment then incorporated the comment submitted by Limited's U.S. shareholder in response to *different* proposed regulations providing guidance on a *different* statute, which did not address small business shareholders at all. *Id.* 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.

IV. 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 enter summary judgment for the Government.

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