NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 13-5061

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SABINA LOVING; ELMER KILIAN; and JOHN GAMBINO,

Plaintiffs – Appellees,

v.

INTERNAL REVENUE SERVICE; DOUGLAS H. SHULMAN, COMMISSIONER OF INTERNAL REVENUE SERVICE; and UNITED STATES OF AMERICA,

Defendants – Appellants.

On Appeal from the United States District Court for the District of Columbia in Case No. 1:12-cv-00385-JEB (Hon. James E. Boasberg, Judge)

BRIEF OF RONDA GORDON, DENNIS TAFELSKI, JASON DINESEN, CHRISTINE ENGEL, RUSSELL FOX, JOE KRISTAN, RICHARD SCHIVELEY, AND THE TAX FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

Patrick J. Smith
Ivins, Phillips & Barker, Chartered
1700 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20006
(202) 662-3415
psmith@ipbtax.com

Counsel for *Amici Curiae*

MAY 24, 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amici.* Except for the following, all parties and *amici* appearing before the district court and in this court are listed in the Brief for the Appellants. Five former Commissioners of Internal Revenue submitted an *amicus curiae* brief in this court in support of defendants-appellants.

B. *Rulings under review.* References to the rulings at issue appear in the Brief for the Appellants.

C. *Related cases.* To the best of his knowledge, counsel for *amici curiae* is not aware of any previous or pending related cases in this court.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Tax Foundation is a section 501(c)(3) non-partisan, non-profit research institution founded in 1937 to educate the public on tax policy. Based in Washington, D.C., its economic and policy analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONTINUED)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

---

* Authorities upon which *amici* principally rely are marked with asterisks.

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

Cases (Continued)

Statutes

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

Statutes (Continued)

Regulations

Other materials

GLOSSARY

Brief of *Amici* Former Commissioners:	Brief *Amici Curiae* of Former Commissioners of Internal Revenue In Support of Defendants-Appellants
Doc. No.:	Document number in the district court
I.R.M.	Internal Revenue Manual
IRS:	Internal Revenue Service
The proposed regulations:	*Regulations Governing Practice Before the Internal Revenue Service*, REG-138637-07, 75 Fed. Reg. 51713 (Aug. 23, 2010)
Publication 4832:	IRS Publication Number 4832, *Return Preparer Review* (December 2009)
The regulations (or the final regulations):	*Regulations Governing Practice Before the Internal Revenue Service*, T.D. 9527, 76 Fed. Reg. 32286 (June 3, 2011), JA 66.
Section 330:	31 U.S.C. § 330

STATUTES AND REGULATIONS

Except for 5 U.S.C. §§ 553, 603, 604, 611, and 706, all applicable statutes and regulations are contained in either the Brief for the Appellants or the Brief of Plaintiffs-Appellees. 5 U.S.C. §§ 553, 603, 604, 611, and 706 are contained in the Addendum to this brief.

STATEMENT REGARDING IDENTITIES AND INTERESTS OF THE *AMICI* AND CONSENT TO FILE

All the parties to this appeal have consented to the filing of this brief.

Ronda Gordon

Ronda Gordon is a tax-return preparer in Vancouver, Washington. She has been preparing returns for 23 years. For many years, Ms. Gordon worked in an accounting firm. For the last 13 years, she has been self-employed, preparing tax returns in her home. She does not advertise, instead obtaining clients through word-of-mouth referrals. She is the parent of an adult handicapped child, who lives with her and for whose care she is responsible. Many of Ms. Gordon's clients are low-income individuals with handicapped children. Ms. Gordon prepares approximately one hundred federal income tax returns each year. She is not an attorney, CPA, or Enrolled Agent, and thus is subject to the regulations. Because her fees are modest (less than half what is charged by accounting firms in her area) and because the cost to comply with the regulations is substantial compared to the total fees she earns each year, it was necessary for her to increase her charges this year because of the cost of complying with the regulations' continuing education

requirements, and it would be necessary for her to increase her charges further next year, if the district court decision is not upheld, because of the cost of complying with the testing requirement. Because of the composition of Ms. Gordon's client base, these fee increases are a burden to her clients.

In addition to the defects in the regulations described by the district court, the plaintiffs-appellees, and this brief, and the direct adverse effects on her and on her clients, Ms. Gordon objects to the regulations because they are unnecessary, since, in Ms. Gordon's experience, most tax return preparers to whom the regulations apply are competent and conscientious; and because the regulations are not targeted to the problems they are intended to address but instead are broadly applicable to many situations where no problems exist.

Dennis Tafelski

Dennis Tafelski is a retired former IRS employee residing in Summerfield, Florida, who in recent years has prepared approximately ten to fifteen individual income tax returns each year for other retirees. Mr. Tafelski worked for the IRS for 33 years, starting in 1973 and retiring in 2006. Mr. Tafelski held various positions during his time with the IRS, including Internal Revenue Agent, Examination Group Manager, and Appeals Officer. Mr. Tafelski prepares returns in his home and does not advertise his services, instead obtaining clients through word-of-mouth referrals. Mr. Tafelski is not an attorney, CPA, or Enrolled Agent,

and thus would be subject to the regulations if he continued preparing federal income tax returns. Because of the cost and compliance burden imposed by the regulations, Mr. Tafelski concluded it is not worthwhile for him to continue preparing returns, because of the small number of returns he prepares and the modest fees he charges. If the district court's decision were upheld, Mr. Tafelski would resume preparing returns.

Based on his longstanding and extensive experience working for the IRS and his experience in preparing returns, Mr. Tafelski has a number of objections to the regulations. In addition to the defects in the regulations described by the district court, the plaintiffs-appellees, and this brief, and the direct effects of the regulations on him, Mr. Tafelski objects to the regulations because they will result in substantially increased tax-return preparation fees for the types of retired individuals for whom Mr. Tafelski has prepared returns; because they contain no exemption for low-volume preparers such as himself; because the regulations' exemption for attorneys and CPAs is unwarranted because of the normal absence of tax-specific continuing education requirements for attorneys and CPAs; and because the IRS has seldom made use of its existing statutorily authorized tools for regulating tax-return preparers, such as the tax-return preparer penalty.

Jason Dinesen

Jason Dinesen is an Enrolled Agent located in Indianola, Iowa. He began preparing tax returns in 2009. He owns and operates a business that provides a variety of tax services for individuals and small businesses, including tax-return preparation. He also maintains a tax blog, dinesentax.com. As an Enrolled Agent, Mr. Dinesen is not directly affected by the regulations. Nevertheless, Mr. Dinesen believes the regulations would have an indirect adverse effect on his business (and on Enrolled Agents generally) because the Registered Tax Return Preparer designation created by the regulations would have the effect of diminishing the value of the Enrolled Agent designation in the market for tax-preparation services, largely because the number of Registered Tax Return Preparers would be substantially greater than the number of Enrolled Agents.

Christine Engel

Christine Engel has been a CPA since 1981. Ms. Engel currently works in a small accounting firm in Tucson, Arizona. Throughout her career, she has specialized in federal income tax work. Currently, she reviews approximately 500 federal income tax returns each year and spends 90 percent of her time on tax work during tax season. During the rest of the year, Ms. Engel spends the majority of her time on federal income tax work, including representing taxpayers in connection with IRS examinations of their income tax returns, before the IRS

Appeals Office, and in connection with a variety of other interactions between taxpayers and the IRS. In addition, Ms. Engel presents seminars to other tax professionals on the preparation of federal income tax returns. Currently, Ms. Engel presents approximately ten to twelve such seminars each year. In previous years, she presented as many as 60 such seminars each year.

As a CPA, Ms. Engel is not directly affected by the regulations. Nevertheless, based on her longstanding and extensive experience in tax practice, Ms. Engel has a number of objections to these regulations. In addition to the defects in the regulations described by the district court, the plaintiffs-appellees, and this brief, Ms. Engel objects to the regulations because they will reduce the availability of low-cost tax-preparation services for taxpayers for whom higher-cost services will be a financial burden; because, in Ms. Engel's experience, the tax-return preparers directly affected by the regulations are generally competent and conscientious; because the regulations are unlikely to eliminate or deter unscrupulous preparers; and because the regulations are likely to create a more adversarial relationship between the IRS and preparers.

Russell Fox

Russell Fox has been an Enrolled Agent since 2003, and a tax professional since 2000. He is located in Las Vegas, Nevada. He is co-owner of Clayton Financial and Tax LLC. Before founding the predecessor of this business in 1999,

he had a 17-year career in finance and accounting. His firm provides the full range of tax services for its clients: tax-return preparation, representation in dealing with the IRS, and consulting. His firm's clients consist primarily of professional gamblers and small business owners. During the current tax season his firm will have prepared approximately 800 to 900 tax returns. He also maintains a tax blog, taxabletalk.com.

As an Enrolled Agent, Mr. Fox is not directly affected by the regulations. Nevertheless, based on his extensive experience in tax practice, he has a number of objections to the regulations. In addition to the defects in the regulations described by the district court, the plaintiffs-appellees, and this brief, Mr. Fox objects to the regulations because the IRS already has ample statutorily authorized tools to apply against incompetent or unscrupulous tax-return preparers; because the regulations will not be effective in eliminating incompetent or unscrupulous tax-return preparers; because they will give a tacit stamp of approval to preparers who are not competent; because they will have the effect of driving many low-volume tax-return preparers out of business, thereby increasing the cost of tax-return preparation services for the clients of those preparers; and because administering the regulations will require scarce IRS resources that could be better used for other purposes, such as combatting identity theft.

Joe Kristan

Joe Kristan has been a CPA since 1984. He is located in Des Moines, Iowa. He is a shareholder in Roth & Company, P.C., an accounting firm with approximately 35 employees, and helped found this firm in 1990. Mr. Kristan practices exclusively in tax matters, including tax-return preparation, primarily for businesses, as well as tax planning and consulting. His clients include closely-held businesses and community banks. Since 2001, Mr. Kristan has maintained his firm's tax blog, taxupdateblog.com. He frequently teaches at tax schools and is an author of articles on tax issues for technical and general publications.

As a CPA, Mr. Kristan is not directly affected by the regulations. Nevertheless, based on his longstanding and extensive experience in tax practice, Mr. Kristan has a number of objections to these regulations. In addition to the defects in the regulations described by the district court, the plaintiffs-appellees, and this brief, Mr. Kristan objects to the regulations because they will reduce options for consumers of tax-preparation services by driving many low-volume but competent and conscientious tax-return preparers out of business because of the cost of compliance with the regulations; will increase the compliance cost and burden on low-volume tax-return preparers that remain in business; will increase the cost of tax preparation services without increasing the value of those services; will prompt some low-income individuals to resort to tax-return preparers who will

evade compliance with the regulations; will prompt some low-income individuals to prepare their own returns, rather than using paid preparers, resulting in less accurate returns; will prompt some low-income individuals to cease filing altogether; will adversely affect Enrolled Agents by diminishing the value of their Enrolled Agent designation; and will likely ultimately be extended to CPAs, attorneys, and Enrolled Agents.

Richard Schiveley

Richard Schiveley has been a CPA for over forty years. He has been a sole practitioner since 1971. He is located in Reno, Nevada. He currently works exclusively on federal income tax matters and currently prepares approximately forty federal income tax returns each year. Mr. Schiveley also does tax planning and tax consultation work.

Because Mr. Schiveley is a CPA, he is not directly affected by the regulations. Nevertheless, based on his longstanding and extensive experience in tax practice, Mr. Schiveley has a number of objections to the regulations. In addition to the defects in the regulations described by the district court, the plaintiffs-appellees, and this brief, Mr. Schiveley objects to the regulations because they are unnecessary because of the ample specific statutory authority to regulate income tax-return preparers the IRS already possesses under a number of provisions of the Internal Revenue Code, such as the tax-return preparer penalties

in 26 U.S.C. §§ 6694 and 6695, among others; and because they impose a substantial compliance burden on tax-return preparers that are small businesses.

The Tax Foundation

The Tax Foundation is a section 501(c)(3) non-partisan, non-profit research institution founded in 1937 to educate the public on tax policy. Based in Washington, D.C., its economic and policy analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability. While the Tax Foundation is not directly affected by the regulations, the Tax Foundation promotes transparency in tax regulation enactment and strong oversight of the IRS and believes the regulations undermine these goals. In addition to the defects in the regulations described by the district court, the plaintiffs-appellees, and this brief, the Tax Foundation believes the costs of the regulations substantially exceed potential benefits.

STATEMENT REGARDING AUTHORSHIP AND MONETARY CONTRIBUTIONS

Pursuant to Federal Rule of Appellate Procedure 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party, counsel for a party, or person other than *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

The district court concluded the interpretation of section 330 the IRS presented to the court as the authority for the regulations was impermissible under step one of the two-step test in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Because the district court concluded the regulations are invalid under *Chevron* step one, it did not decide whether the regulations would be invalid under step two of *Chevron*'s two-step test or the Administrative Procedure Act's arbitrary and capricious standard, 5 U.S.C. § 706(2)(A).

Amici believe the district court was correct to hold the regulations invalid under *Chevron* step one and endorse the plaintiffs-appellees' arguments in support of the district court's holding. However, because this Court's Rule 29(a) provides that an *amicus curiae* brief should not repeat legal arguments made by the party the *amicus* is supporting, this brief will not focus primarily on whether the district court was correct in its *Chevron* step one holding.

This brief will instead focus primarily on additional reasons the regulations are invalid and why the district court should accordingly be affirmed even if this Court rejects its *Chevron* step one holding. First, however, this brief will address the argument made by *amici* former Commissioners that preparing a tax return is equivalent to "presenting a case."

I. Preparing a tax return is not "presenting a case."

The district court correctly concluded that filing a tax return would never be considered "presenting a case":

> At the time of filing, the taxpayer has no dispute with the IRS; there is no "case" to present. This definition makes sense only in connection with those who assist taxpayers in the examination and appeals stages of the process.

JA 20. Other considerations also support the conclusion that a tax-return preparer does not thereby "advise and assist persons in presenting their cases."

Section 330's reference to "advis[ing] and assist[ing] persons in presenting their cases" refers to presenting cases to an administrative agency (the Treasury Department). Nevertheless, the more usual context for "presenting cases," especially in 1884, is presenting cases in court, and the phrase "presenting their cases" should accordingly be interpreted consistently with the meaning of "presenting cases" in court. Moreover, the activities involved in presenting cases to an administrative agency are similar to the activities involved in presenting cases in court.

Presenting cases to either a court or an administrative agency requires the formulation and presentation of factual evidence and legal arguments, in writing and in person, to support the position of the party represented. Presenting a case encompasses not only the party's affirmative case but also the formulation and

presentation of responses, on factual and legal issues, in writing and in person, to questions or objections regarding the party's affirmative case.

Preparing a tax return involves none of these activities. Preparing a tax return instead involves merely the presentation of *conclusions* regarding the various items that should be reported on the return. A tax return presents neither factual evidence nor legal arguments supporting the conclusions reflected in the amounts on the return. Consequently, a tax-return preparer is clearly not engaged in the combination of written and in-person formulation and presentation of factual evidence, legal arguments, and responses to questions and objections that characterizes presenting a case either in court or to an administrative agency.

Amici former Commissioners contend that preparing a tax return involves "advis[ing] and assist[ing] persons in presenting their cases" because "Congress has decided to administer a wide variety of government assistance programs through the federal income tax system" and because "preparing and filing a tax return is the sole means by which taxpayers are able to present to Treasury their qualification for these programs." Brief of *Amici* Former Commissioners at 2. There are several flaws in this position.

First, the brief of *amici* former Commissioners shows the amount of total tax refunds paid in 2012 attributable to the two government assistance programs for which *amici* former Commissioners present totals, $76 billion, was less than 25

percent of the total tax refunds of $322 billion paid that year. *Id.* at 6-7. As *amici* former Commissioners acknowledge, "[a] large percentage of the total amount refunded is attributable to excess wage withholding." *Id.* at 6. Refunds attributable to excess wage withholding are clearly not attributable to the "government assistance programs" on which *amici* former Commissioners rely for their contention that preparing tax returns constitutes "presenting cases."

Moreover, *amici* former Commissioners also acknowledge that "only a tiny fraction of the 120 million claims for refund filed against the Treasury will result in any sort of contested administrative or judicial proceeding." *Id.* at 8. As the district court noted, "[a]t the time of filing, the taxpayer has no dispute with the IRS; there is no 'case' to present."

Amici former Commissioners likewise do not address the considerations demonstrating that "presenting a case" in normal usage encompasses written and in-person presentation of factual evidence and legal arguments. As discussed above, preparing a tax return includes none of those activities.

Amici former Commissioners focus only on returns claiming a refund. However, the regulations are not limited to the preparation of returns claiming a refund but also apply to returns showing an amount of tax not yet paid. The contention by *amici* former Commissioners that preparing a *refund claim* is equivalent to "presenting a case" is not only erroneous on its own terms, but also

clearly does not support the conclusion that preparing a tax return *that does not claim a refund* is equivalent to "presenting a case." The repeated references to "claimants" in the original 1884 version of section 330 confirm that income tax returns, which may or may not claim a refund, are not covered by section 330.

The preambles to the proposed and final regulations suggest that tax-return preparers, in preparing a return, advise and assist taxpayers:

> Tax return preparers provide advice to taxpayers, identify items or issues for which the law or guidance is unclear, and inform taxpayers of the benefits and risks of positions taken on a tax return, and the tax treatment or reporting of items and transactions.

75 Fed. Reg. at 51718; JA 74.

Even if it were correct that tax-return preparers ordinarily advise and assist taxpayers by preparing tax returns, that is not equivalent to advising and assisting in "presenting a case," as discussed above. For the same reasons, even for returns claiming a refund, advising and assisting in *presenting a claim* is not equivalent to advising and assisting in "presenting a case." Moreover, the original 1884 version of section 330 repeatedly referred to "claimants" but nevertheless referred to "the presentation of their cases," not to "the presentation of their claims," thereby leaving no doubt that "the presentation of a case" is not the same thing as "the presentation of a claim."

Moreover, while the preambles' description of the relationship between a tax-return preparer and a taxpayer may sometimes be accurate, in many cases this

description is not accurate, because there is no personal contact between the tax-return preparer and the taxpayer. Instead, the taxpayer simply delivers a file to a clerical worker in a tax-preparation office, who then gives the file to one of the office's tax-return preparers based on the preparer's availability rather than the preparer's familiarity with the particular taxpayer's situation.

In such circumstances, which are much more common than those described in the preambles, there is no advice given by the preparer to the taxpayer, no identification for the taxpayer of items or issues for which the law is unclear, and no informing of the taxpayer of the benefits or risks of positions taken on the return. The preparer simply prepares the return and passes it on for review, and the taxpayer later receives the completed return. This process is clearly not "advising" and "assisting" of any sort, much less advising and assisting in "presenting a case."

II. The regulations violate the APA's arbitrary and capricious standard and *Chevron* step two.

The regulations are invalid under both *Chevron* step two and the APA's arbitrary and capricious standard. The district court stated "Plaintiffs offer no independent argument for why, if the statute is ambiguous, the IRS's interpretation would be 'arbitrary or capricious in substance, or manifestly contrary to the statute' under *Chevron* step two," JA 18. However, in their brief supporting their motion for summary judgment, plaintiffs-appellees stated, "[i]n the alternative, if the Court

finds that the statute is ambiguous, Plaintiffs assert these same arguments under step two of *Chevron*." Doc. No. 12 at 16 n.12.

Although plaintiffs-appellees did not rely on the arbitrary and capricious standard in the district court, nevertheless, the conclusion the regulations are invalid under this standard provides a proper alternative basis for affirming the district court if this Court concludes the district court was incorrect in its *Chevron* step one holding. *See*, *e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (restating "the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason'"). In addition, as discussed below, the district court specifically identified one reason why the regulations violated the arbitrary and capricious standard.

The arbitrary and capricious standard will be discussed first because this standard not only operates independently of *Chevron* but also overlaps considerably with *Chevron* step two. This overlap is another reason why the arbitrary and capricious standard provides a basis for affirming the district court, because of the plaintiffs-appellees' alternative reliance on *Chevron* step two.

A. The regulations violate the arbitrary and capricious standard.

The APA arbitrary and capricious standard provides:

> The reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

5 U.S.C. § 706(2)(A).

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983), elaborated on this standard. At the time an agency makes a decision, the agency must "articulate a satisfactory explanation for its action." *Id.* at 43. The explanation must be "sufficient to enable [a court] to conclude that the [decision] was the product of reasoned decisionmaking." *Id.* at 52. The agency must consider alternative approaches and explain why it rejected those alternatives. *See id.* at 48. "[T]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action…. [A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* at 50 (citations omitted).

The agency decision primarily at issue here is the IRS's conclusion that section 330 authorizes the IRS to regulate tax return preparers. Because the IRS did not provide the explanation *State Farm* requires for this conclusion, the arbitrary and capricious standard was violated, regardless of whether the government provides such an explanation in litigating this case, because "the

courts may not accept appellate counsel's *post hoc* rationalizations for agency action." This requirement that the agency, not appellate counsel, must provide a sufficient explanation encompasses issues of statutory interpretation. *See*, *e.g.*, *Northern Air Cargo v. United States Postal Service*, 674 F.3d 852, 860 (D.C. Cir. 2012).

The preambles to both the proposed and final regulations identify a study conducted by the IRS and reported in Publication 4832 as the source of the IRS decision to issue the regulations. *See* 75 Fed. Reg. at 51714; JA 66-67. The discussion in Publication 4832 of the IRS's authority is a single paragraph:

> *The IRS believes that increased oversight of paid tax return preparers does not require additional legislation.* As discussed more fully below, the IRS' intention is to require paid tax return preparers to register with the IRS through the issuance of regulations under section 6109 of the Internal Revenue Code. Further, *the IRS considers the preparation of a tax return for compensation as a form of representation before the agency.* Thus, the IRS intends to amend the regulations under 31 U.S.C. 330 to clarify that any person preparing a tax return for compensation is practicing before the agency and, therefore, must demonstrate good character, good reputation, and the necessary qualifications and competency to advise and assist other persons in the preparation of their federal tax returns. The IRS, therefore, is recommending the following.

Publication No. 4832, at 33 (emphasis added).

This single paragraph clearly is not the reasoned explanation *State Farm* requires. This paragraph simply states the conclusion that section 330 authorizes

the IRS to regulate tax return preparers, without providing any reasoning supporting that conclusion.

The references to section 330 in the preambles to the proposed and final regulations are equally inadequate. The preamble to the proposed regulations contains only three substantive references to section 330:

> Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury (the Secretary) to regulate the practice of representatives before the Treasury Department. The Secretary is authorized, after notice and an opportunity for a proceeding, to censure, suspend, or disbar from practice before the Treasury Department those representatives who are incompetent, disreputable, or who violate regulations prescribed under section 330 of title 31.
>
> ….
>
> The proposed regulations require a tax return preparer to demonstrate the necessary qualifications and competency to advise and assist other persons in the preparation of all or substantially all of a tax return or claim for refund. *The legal basis for these requirements is contained in section 330 of title 31.*

Id. at 51714, 51725 (emphasis added).

The preamble contains no explanation of the reasoning supporting the conclusion that "[t]he legal basis for these requirements is contained in section 330 of title 31." The preamble to the final regulations contains the same references to section 330 as the first two references in the preamble to the proposed regulations, but not the third, and contains no other explanation of how the IRS concluded section 330 gives the IRS the authority to issue the regulations. *See* JA 66, 78.

These references to section 330 in Publication 4832 and the preambles clearly do not satisfy *State Farm*'s requirement that the agency must "articulate a satisfactory explanation for its action." The IRS's failure to provide any satisfactory explanation of the reasoning supporting its conclusion that section 330 authorizes the regulations represents a clear violation of the APA's arbitrary and capricious standard.

B. The IRS's failure to explain its reasoning represents a policy choice.

The lack of explanation in the preambles is not surprising in light of the instructions the IRS provides to IRS personnel in the Internal Revenue Manual on drafting regulations and their preambles:

> In the Explanation of Provisions section, the drafting team should describe the substantive provisions of the regulation in clear, concise, plain language without restating particular rules contained in the regulatory text. *It is not necessary to justify the rules that are being proposed or adopted or alternatives that were considered.*

I.R.M. § 32.1.5.4.7.3(1), http://www.irs.gov/irm/part32/irm_32-001-005.html (emphasis added).

The instruction that "[i]t is not necessary to justify the rules that are being proposed or adopted or alternatives that were considered" is directly at variance with the requirements of the APA arbitrary and capricious standard, as explained in *State Farm*. Thus, violations of the reasoned-explanation requirement represent a policy choice by the IRS.

This section of the I.R.M. is dated September 30, 2011, but the language quoted was identical in the previous version of this section, dated August 11, 2004. Thus, this instruction was in effect when both the proposed and final regulations were issued.

C. The IRS's failure to explain its reasoning cannot be excused on the basis that its "path" can be "discerned."

State Farm's statement that "[w]e will, however, 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned,'" 463 U.S. at 43, cannot apply here, since very different possible "paths" have been "discerned" by the government and by *amici* former Commissioners.

In the district court and in its opening brief in this Court, the government contended the IRS conclusion that section 330 authorizes the regulations should be upheld because "the practice of representatives of persons before the Department of the Treasury" referred to in section 330 *should not be interpreted as being limited to* "advis[ing] and assist[ing] persons in presenting their cases." In contrast, *amici* former Commissioners contend the position that section 330 authorizes the regulations should be upheld on the very different ground that preparing tax returns *should be considered* as "advis[ing] and assist[ing] persons in presenting their cases."

These are two mutually exclusive potential paths to a conclusion that section 330 authorizes the regulations. The fact that the government has "discerned" one

path, while *amici* former Commissioners have "discerned" the other path, should, without regard to the merits of either potential path, leave no doubt that it is not correct here to say that "the agency's path may reasonably be discerned."

D. The IRS's unexplained change of position on section 330 also violated the APA.

The district court identified an additional reason why the IRS violated the arbitrary and capricious standard, and this provides another alternative basis for affirming the district court. Discussing "whether the IRS has changed its interpretation of § 330 over time," JA 29, the district court concluded "Plaintiffs seem to be correct that the new Rule contradicts previous interpretations of § 330." *Id.* The district court also stated "the Court could find no explanation for the IRS's flip-flop in the new Rule," after quoting the statement in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 981 (2005), that "[u]nexplained inconsistency is … a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act." JA 29. *See also*, *e.g.*, *Honeywell International, Inc. v. NRC*, 628 F.3d 568, 579 (D.C. Cir. 2010). While the district court did not rely on this point, the district court's discussion of this point nevertheless provides another alternative basis for affirming the district court.

E. Other defects in reasoning and explanation also violate the arbitrary and capricious standard.

The IRS violated the APA's arbitrary and capricious standard in issuing the regulations in additional ways beyond those described above. For example, the IRS engaged in a flawed cost/benefit analysis under Executive Order 12866 in rejecting alternative approaches. The IRS ignored the increased costs to consumers of tax-return preparation services in making this analysis.

The preambles to both the proposed and final regulations contain sections presenting the analysis required by Executive Order 12866. *See* 75 Fed. Reg. at 51718-25; JA 73-78. While agency compliance with Executive Order 12866 is not subject to judicial review, nevertheless, these sections of the preambles are relevant in determining whether the IRS violated the APA's arbitrary and capricious standard. *Cf.*, *e.g.*, *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984) ("if data in the regulatory flexibility analysis—or data anywhere else in the rulemaking record—demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious, 5 U.S.C. § 706(2)(A), the rule cannot stand") (Scalia, J.) (decided before compliance with Regulatory Flexibility Act was subjected to judicial review).

The Executive Order 12866 analysis is particularly relevant because it is only there that the preambles present any discussion of the reasons for adopting the regulations (excluding the authority issue) that could possibly satisfy the arbitrary

and capricious standard. *See* 75 Fed. Reg. at 51718-20; JA 74-75. Moreover, it is only there that the preambles present the discussion of alternatives considered and rejected that *State Farm* requires. See 75 Fed. Reg. at 51724-25; JA 77-78.

These sections discuss the costs anticipated from the regulations. See 75 Fed. Reg. at 51720-24; JA 75-77. Moreover, the discussion of the alternatives considered and rejected addresses the relative costs and benefits of these alternatives. The significant flaw in these discussions of costs and benefits is that the universe of costs discussed is strikingly incomplete. The costs considered include only the costs to tax return preparers, the costs to providers of continuing education, and the costs to the government.

Conspicuously absent from this discussion is the cost to consumers of tax-preparation services that will result from the additional costs imposed on tax-return preparers. Because the cost to consumers was not considered, there was likewise no consideration of whether that cost is likely to outweigh whatever benefits to consumers may result from the imposition of these requirements. The IRS's failure to consider the cost to consumers "demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious." *Thompson v. Clark*, *supra*, 741 F.2d at 405.

Moreover, the cost to consumers is not the only relevant consideration completely omitted in Publication 4832 and the preambles to the proposed and

final regulations. An additional relevant but omitted consideration is why the various specific statutory tools in the Internal Revenue Code authorizing the IRS to penalize tax-return preparers, *see* JA 22-23, 25-26, would not have been sufficient to achieve the goals of the regulations. In this regard, the IRS also failed to discuss why any possible additional authority the regulations might give the IRS to penalize tax-return preparers, beyond the specific statutory authority in the Internal Revenue Code, would be sufficient to warrant the costs imposed by the regulations.

F. The regulations violate *Chevron* step two for the same reasons they violate the APA.

The regulations violate *Chevron* step two for the same reasons they violate the arbitrary and capricious standard, because *Chevron* step two and the arbitrary and capricious standard impose equivalent requirements. *See*, *e.g.*, *General Instrument Corp. v. FCC*, 213 F.3d 724, 732 (D.C. Cir. 2000); *Shays v. FEC*, 528 F.3d 914, 924 (D.C. Cir. 2008); *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011); *Village of Barrington v. Surface Transportation Board*, 636 F.3d 650, 660 (D.C. Cir. 2011) (*Chevron* deference applies "only if the agency has offered a reasoned explanation").

G. The regulations also violate the arbitrary and capricious standard by violating the Regulatory Flexibility Act.

The regulations also violate the Regulatory Flexibility Act, 5 U.S.C. §§ 601 to 612, because, contrary to the requirements of the Act, the IRS failed to consider alternative approaches that would treat small businesses differently than larger entities. The Act imposes procedural requirements for issuing regulations, including the preparation of an initial regulatory flexibility analysis, *see* 5 U.S.C. § 603(a), and a final regulatory flexibility analysis, *see* 5 U.S.C. § 604(a). The IRS prepared both an initial regulatory flexibility analysis and a final regulatory flexibility analysis. *See* 75 Fed. Reg. at 51725-26; JA 78-80.

"The Regulatory Flexibility Act makes the interests of small businesses a 'relevant factor'" in applying the *State Farm* requirement that an agency decision must be "based on 'consideration of the relevant factors.'" *National Telephone Cooperative Association v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009). Thus, a violation of the Regulatory Flexibility Act is also a violation of the arbitrary and capricious standard.

The final IRS regulatory flexibility analysis acknowledges the regulations affect many small businesses. "The IRS estimates that approximately seventy to eighty percent of the individuals subject to these regulations are paid preparers operating as or employed by small entities." JA 78-79. Plaintiffs-appellees in this case (as well as two of the amici, Ronda Gordon and Dennis Tafelski) are not only

unquestionably the types of small business whose interests the Regulatory Flexibility Act protects but are also directly affected by the regulations. *See*, *e.g.*, *Aeronautical Repair Station Association, Inc. v. FAA*, 494 F.3d 161, 175-77 (D.C. Cir. 2007).

The final regulatory flexibility analysis must explain how the agency has minimized the impact on small business:

> [E]ach analysis must include "a description of the steps the agency has taken to minimize the significant economic impact" that its rule will have on small businesses, "including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected."

National Telephone Cooperative, *supra*, 563 F.3d at 540 (describing and quoting what is now 5 U.S.C. § 604(a)(6)).

The initial regulatory flexibility analysis is not subject to judicial review, *see*, *e.g.*, *Allied Local and Regional Manufacturers Caucus v. EPA*, 215 F.3d 61, 79 (D.C. Cir. 2000), but judicial review of the final regulatory flexibility analysis should consider the initial regulatory flexibility analysis. *Cf. id.* at 79 n.18. The requirement that the final regulatory flexibility analysis must explain the reasons for selecting the alternative chosen and for rejecting other alternatives must be read in light of the requirements for the initial regulatory flexibility analysis:

> Each initial regulatory flexibility analysis shall … contain a description of any *significant alternatives to the proposed rule which*

> *accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities*. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—
>
> (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
>
> (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
>
> (3) the use of performance rather than design standards; and
>
> (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

5 U.S.C. § 603(c) (emphasis added).

Section 604(a)(6), when read in the context of section 603(c), makes clear that an agency must consider alternatives that treat small businesses *differently* than other entities. Both the initial IRS regulatory flexibility analysis and the final IRS regulatory flexibility analysis show the IRS violated the Regulatory Flexibility Act by *failing to consider any alternatives that treated small businesses differently* than larger entities.

The initial regulatory flexibility analysis lists three alternatives to the approach adopted. *See* 75 Fed. Reg. at 51726. The final regulatory flexibility analysis repeats these three alternatives and adds one additional alternative. *See* JA 79. However, none of these alternatives would have imposed *different* requirements on small business than those imposed on larger entities. The IRS

attempted to justify the result: "[T]he regulations do not subject small entities to requirements that are not also applicable to large entities covered by the regulations." JA 80. This statement demonstrates how little the IRS understands the Regulatory Flexibility Act.

Compliance with the Regulatory Flexibility Act requires only a "reasonable, good-faith effort" by the agency. *United States Cellular Corporation v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001). The IRS fell far short of that standard here, and by doing so also violated the APA's arbitrary and capricious standard.

III. The regulations violated the APA's notice and comment requirements.

The IRS also violated the APA's notice and comment requirements, 5 U.S.C. § 553, by failing to disclose for public review and comment an IRS analysis of comments submitted in response to Notice 2009-60 that the IRS clearly relied on.

Publication 4832 describes the process the IRS used to obtain public input prior to issuing the proposed regulations. *Id.* at 25-32. That process included issuing Notice 2009-60, 2009-2 C.B. 181, requesting comments on IRS regulation of tax-return preparers. Publication 4832 at 30-32. "The IRS received more than 500 comments in response to this solicitation." *Id.* at 31. "Highlights from an IRS analysis of the responses include" percentages of comments favoring specific regulatory steps. *Id.* For example, "90 percent of the individuals who commented

on education and testing favor minimum education or testing requirements for paid tax return preparers." *Id.* *See also id.* at 2.

Publication 4832 includes "findings and recommendations." *See id.* at 32-41. The percentages of comments favoring specific regulatory steps are repeatedly cited prominently in the description of the recommendations. *See*, *e.g.*, *id.* at 33, 34, 36. The executive summary states: "After consideration of the input provided through the public comment process, the IRS believes" the recommendations should be adopted. *Id.* at 2. Thus, Publication 4832 clearly suggests the recommendations were based on the "IRS analysis" of the public comments received.

The preambles to the proposed and final regulations make clear that the regulations were derived from Publication 4832's recommendations. *See*, *e.g.*, 75 Fed. Reg. at 51714; JA 66-67. Moreover, both preambles repeat Publication 4832's list of percentages of commenters favoring specific regulatory steps. *See* 75 Fed. Reg. at 51719; JA 74.

Thus, in issuing the regulations, the IRS clearly relied on the "IRS analysis" of comments responding to Notice 2009-60 that calculated percentages of comments favoring particular regulatory steps. However, the IRS did not make this analysis available to the public for review and comment in the rulemaking process. If an agency relies on studies, including staff reports, in issuing

regulations, failure to make those studies available to the public for review and comment as part of the rulemaking process violates the APA's notice and comment requirements. *See*, *e.g.*, *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).

The IRS's failure to make available the IRS analysis of comments responding to Notice 2009-60 clearly comes within this principle. Moreover, the IRS's failure to disclose this analysis was prejudicial to commenters on the proposed regulations. For example, while Publication 4832 states over 500 comments were submitted, it does not specify the number of comments that addressed each specific regulatory step on which Publication 4832 provides percentages favoring each step. Disclosure of this information is relevant in evaluating the IRS's claim that the comments overwhelmingly favored the regulatory steps adopted in the regulations. Moreover, Publication 4832 states that "90 percent of the individuals who commented on education and testing favor minimum education *or* testing requirements for paid tax return preparers" (emphasis added), but neither Publication 4832 nor the preambles identify the percentage of commenters favoring the imposition of *both* minimum education *and* testing requirements, much less *the combination of all the requirements imposed by the regulations*.

DATED: May 24, 2013

Respectfully submitted,

/s/ Patrick J. Smith
Patrick J. Smith
Ivins, Phillips & Barker, Chartered
1700 Pennsylvania Ave., N.W.
Suite 600
Washington, D.C. 20006
(202) 662-3415
psmith@ipbtax.com
Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(a).

__X__ The brief contains 6,987 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii),or

____ The brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

__X__ The brief has been prepared in a proportionally spaced typeface using MS Word 2002 in a 14 point Times New Roman font or

____ The brief has been prepared in a monospaced typeface using MS Word 2002 in a ___ characters per inch_____ font.

May 24, 2013

/s/ Patrick J. Smith
Patrick J. Smith
Counsel for *Amici Curiae*

United States Court of Appeals
for the District of Columbia Circuit
Sabina Loving, et al v. IRS, et al, No. 13-5061

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by IVINS, PHILLIPS & BARKER, CHARTERED, Attorneys for *Amici Curiae* to print this document. I am an employee of Counsel Press.

On **May 24, 2013**, Counsel for *Amici Curiae* has authorized me to electronically file the foregoing **Brief of *Amici Curiae*** with the Clerk of Court using the CM/ECF System, which will serve, via e-mail notice of such filing, to any of the following counsel registered as CM/ECF users:

Richard Farber
Gilbert S. Rothenberg
Patrick J. Urda
Department of Justice, Tax Division
Post Office Box 502
Washington, D.C. 20044
(202) 514-3361
richard.farber@usdoj.gov
appellate.taxcivil@usdoj.gov
civil.appellate@usdoj.gov
Counsel for Appellants

Scott G. Bullock
William H. Mellor, III
Daniel Lamar Alban
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, VA 22203
703-682-9320
sbullock@ij.org
paralegal@ij.org
dalban@ij.org
Counsel for Appellees

Charles Harak
National Consumer Law Center
7 Winthrop Square, 4th Floor
Boston, MA 02110
617-542-8010
charak@nclc.org
Counsel for Amicus Curiae
National Consumer Law Center

Ari Simon Bargil
Institute For Justice
Firm: 305-721-1600
999 Brickell Avenue, Suite 720
Miami, FL 33131
305-721-1600
abargil@ij.org
Counsel for Appellees

David William Foster
Skadden, Arps, Slate, Meagher
& Flom LLP
1440 New York Avenue, NW
Washington, DC 20005
202-371-7000
david.foster@skadden.com
Counsel for Amici Curiae
Mortimer M. Caplin, et al.

Paper copies will also be mailed to the above counsel on this date.

Additionally eight paper copies will be filed with the Court, via Express Mail on the same day.

May 24, 2013

/s/ Robyn Cocho
Robyn Cocho
Counsel Press

ADDENDUM

ADDENDUM
TABLE OF CONTENTS

Page

5 U.S.C. § 553 Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 603 Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

(b) Each initial regulatory flexibility analysis required under this section shall contain—

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

(d)(1) For a covered agency, as defined in section 609(d)(2), each initial regulatory flexibility analysis shall include a description of—

(A) any projected increase in the cost of credit for small entities;

(B) any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and

(C) advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).

(2) A covered agency, as defined in section 609(d)(2), shall, for purposes of complying with paragraph (1)(C)—

(A) identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and

(B) collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).

5 U.S.C. § 604 Final regulatory flexibility analysis

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain—

(1) a statement of the need for, and objectives of, the rule;

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

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

(6)[1] for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

[1] So in original. Two pars. (6) have been enacted.

5 U.S.C. § 611 Judicial review

(a)(1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(3)(A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than—

(i) one year after the date the analysis is made available to the public, or

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to—

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

5 U.S.C. § 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.