

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA; and
TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs,

v.

INTERNAL REVENUE SERVICE; *et al.*,

Defendants.

Civil Action No. 1:16-cv-00944-LY

**PLAINTIFFS' RESPONSE TO DEFENDANTS'
SUPPLEMENTAL MEMORANDUM REGARDING REMEDIES**

In their supplemental filing (Dkt. 64), Defendants contend that even if the Court “finds fault” with the challenged Rule, vacating it “may not” be the proper remedy. Actually, it is quite clear that the only appropriate remedy here is to vacate Treasury’s unlawful regulation.

1. The Administrative Procedure Act (“APA”) speaks directly to the question of remedy. If a court concludes an “agency action” is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”—or if that action was taken “without observance of procedure required by law”—then it “shall ... set aside” such agency action. 5 U.S.C. § 706. In common usage, “[t]he word ‘shall’ is mandatory in its meaning,” *Valdez v. Cockrell*, 274 F.3d 941, 950 (5th Cir. 2001), and Defendants do not argue otherwise. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971) (“In all cases agency action must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ or if the action failed to meet statutory, procedural, or constitutional requirements.”).

2. Defendants' supplemental memorandum invokes a single Fifth Circuit opinion for the proposition that, under certain unusual circumstances, it may be appropriate to remand a rule to an agency without vacating it: *Central & South West Services v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000). That opinion does not help Defendants. The Fifth Circuit reasoned that remand-without-vacatur was proper under the Toxic Substances Control Act because the agency's sole failure was not "stat[ing] explicitly" on the record why it rejected comments from the electric utility industry seeking an exemption from the rule. *Id.* at 692. Because the court determined that the EPA could "justify its decision" in this regard simply by "giv[ing] reasons" for its refusal to incorporate such an exemption—and because this defect did not even arguably implicate the rule's application to "other members of the regulated community"—the court did not vacate the rule, but instead remanded for a "reasoned statement of why [the EPA] did not grant a national variance for the electric utility industry" per that industry's request. *Id.*

That case, even if read to apply in the APA context, is inapposite because none of its unusual circumstances is present here. Plaintiffs' primary challenge to the Rule is that it exceeds Treasury's statutory authority. Unlike in *Central & South West*, that defect cannot be cured through any additional agency explanation; it renders the entire Rule invalid and compels vacatur. Likewise for Treasury's failure to comply with the APA's notice-and-comment requirement. Nor can Treasury explain away its arbitrary and capricious targeting of Pfizer and Allergan. And these defects taint the Rule in its entirety—as applied to all of the transactions that it covers. In short, there is nothing that Treasury could "state" on remand that could justify its prior legal violations. There is thus no basis for departing from the APA's remedy by leaving the illegal Rule in place, particularly because that would continue to harm Plaintiffs' members and needlessly prolong this litigation.

Respectfully submitted,

Dated: February 21, 2017

/s/ Laura Jane Durfee

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2017, I filed the foregoing Response to Defendants' Supplemental Memorandum Regarding Remedies with the Court through the Court's CM/ECF system. I further certify that I will serve a true and correct copy of the foregoing Response on the following attorneys:

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